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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted] 1083

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

L. V. WALLACE.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 28, 1909.

(21,775.)

(21,775.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 549.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

L. V. WALLACE.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 16, 1909.

and which were duly paid to the delivering carrier, received from the firm of Barnes, Wallace & Co. for delivery to the Massachusetts Mohair Plush Company, at Lowell Mass., said firm paying freight and charges on same, the Mohair described in this petition, and which was of the reasonable market value at Lowell, Mass., all told of the sum of $436.20.

3 That said defendant then and there at the time of receiving said Mohair from said firm, did issue, execute and deliver to the said firm, Bills of Lading, of dates, viz: October 10th, 1906; October 23rd, 1906 and November 14th, 1906, which said Bills of Lading will be introduced in evidence, or copies thereof, at the trial of this case, with description of said mohair by bag & mark on said bag, and weight of said bag or bags, and stating that the same were received by said defendant, for delivery to the said Massachusetts Mohair Plush Co. at Lowell, Mass., which mohair was at the dates hereinafter stated then and there delivered to the said defendant, at Uvalde Station in perfect good order and condition, upon the agreement and contract with the said defendant that, it was to be delivered in like order and condition to the said, the Massachusetts Mohair Plush Company, at Lowell, Mass. Said mohair is thus described by date of delivery number of bags marks on bags number of pounds of bags, viz:

October 10th, 1906, One bag marked F, weight 347 lbs., value per lb., 30 cents	$104.10
October 10th, 1906, One bag marked S. K., weight when shipped 364 pounds, weight when received 271 lbs., loss 93 lbs., at 30¢	27.90
October 23rd, 1906, one bag marked W, weight 109 lbs., total loss value, 30¢ per pound	32.70
October 23rd, 1906, 3 lbs. short on bag marked T. H. S. which weighed 193 lbs	.90
November 14th, 1906, 3 bags—2 of them marked J. C. Pope and one marked J. G. weight of 3 bags 902 lbs., total loss at per lb. 30¢	270.20
	$436.20

Fifth. The plaintiff represents that as to the last three bags shipped Nov. 14th, 1906, the Bill of Lading or the Bills of Lading, are in the possession of the defendant, and notice is again give- it, to produce the same at the trial hereof, or secondary evidence of the contents and recitals of the same will be introduced by the plaintiff, on the trial of the case.

4 Sixth. The plaintiff alleges that as to the two bags marked W both weighing 386 lbs., shipped on the 23rd day of October, 1906, that one of them weighed 277 lbs., and the other 109 lbs.; that the one which weighed 277 lbs. reached its destination; but that the other weighing 109 lbs., was lost in transit. That the three bags shipped on Nov. 14th, 1906, two marked: J. C. Pope and one marked J. G. all weighed 902 lbs. an average of 300⅔ lbs., each one, which three bags were a total loss to the plaintiff, never hav-

ing reached their destination. The plaintiff alleg-s that in the Bills of Lading pleaded herein the agent of the defendant, or the party preparing them, used the character: # as a mark of designation for lbs. instead of writing the word pound, or the usual lb. That the said character appears after the figures in said Bills of Lading.

Seventh. The plaintiff alleges that the defendant did not safely carry and deliver the said mohair in accordance with its contract and duty under the law, but on the contrary, so negligently conducted it- said shipments that the mohair above stated, never reached its destination, but, was, lost or stolen in transit between Uvalde, Texas, and Lowell Mass., to the plaintiff's damage in the sum of $436.20.

Wherefore, premises considered, the plaintiff prays that as the defendant has been duly cited, that on a final hearing that the plaintiff have his judgment against said defendant in *in* the sum of $436.20 with six per cent interest per annum from the first day of December, 1906, till paid, and all costs of Court, and for general and special relief.

MARTIN, OLD & MARTIN,
Attorneys for Plaintiff.

Filed 14 day of Sept. 1908.

First Amended Answer.

(Filed 9/21/08.)

5 Pending in County Court, Uvalde County, Texas, Sept. Term, 1908.

No. —.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Now comes this defendant and by leave of the Court amends its original answer filed herein and for amendment says it — and demurs generally to plaintiff's petition and says the same is insufficient in law to entitle him to recover, and states no cause of action against defendant, and of this it prays judgment.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant, G. H. & S. A. Ry. Co.

And excepting specially to plaintiff's petition, defendant says the same is insufficient in law for the following reasons, each of which is submitted for separate judgment of the court, as follows:

First. For want of details and particulars showing when, where and how and by whom his alleged damages were inflicted, and how or why this defendant became liable to him for the same or any part

thereof, and if for any part, the sum and amount he is liable for and why and upon what facts and reasons.

Second. For want of particulars to show the specific nature and extent of the damage this defendant is charged with, and how and where it was inflicted, and by whom.

Third. It does not state the proper and lawful measure of damage, but demands judgment upon an improper and incorrect and unlawful measure of damages upon the facts stated.

And upon each and all of said special exceptions defendant prays judgment.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant, G. H. & S. A. Ry. Co.

And for answer herein, if answer be required, defendant denies all and singular the allegations contained in plaintiff's petition, and says they are not true, and demands strict proof.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant, G. H. & S. A. Ry. Co.

6 And for further answer herein defendant says that the mohair in question was accepted and transported by defendant under and by virtue of contracts in writing executed by plaintiff or his agent thereunto duly authorized which were accepted & acted upon by plaintiffs & defendant and which contracts contained the express provision that this defendant should not be held liable for loss or for damage to the mohair except while in its charge & that upon delivery of same to its next succeeding carrier it should be absolved from further liability & it says it fully promptly and faithfully complied with said stipulation and delivered said Mohair to its next connecting carrier as routed to wit the Southern Pacific Steamship line the Mallory line at Galveston Texas.

And defendant further says that if there be any act of Congress of the United States which authorizes or attempts to authorize the courts of this state under the pleadings and facts in this case to give judgment against this defendant herein, on behalf of plaintiff, for the loss and damage, or any part thereof which was not due to any wrong violation of contract or negligence on its part, but due to the wrong or default of any other carrier over whose line the shipment was transported, then such law is violative of the Constitution of the United States and of the State of Texas, in that the effect of it is:

1st. To take the property of this defendant without compensation, and without due process of law, and to bestow it upon another without any violation of contract, default or wrong on the part of this defendant of which plaintiffs have any just right to complain:

2nd. To deprive this defendant of the equal protection of the law, in that it denies to it the right of contract, and to have and enjoy the benefits of its contracts such as is accorded to all other classes of persons and corporations engaged in business enterprises; and it is denied thereunder the right to acquire, hold or enjoy property to

that full extent enjoyed by other corporations and natural persons engaged in business enterprises in Texas:

7 3rd. The effect of it is to invade the exclusive domain of the State Legislation and states rights, and in the guise of regulating interstate commerce to create on behalf of the shipper, a resident of the State of Texas, a penalty, and to levy on his behalf arbitrarily a contribution against the railroads of this state, conducting their business wholly within the State without any wrong or default whatever upon their part, but wholly and entirely to compensate the shipper for loss or damage done to his property by the non resident carriers who are entire strangers to the originating carrier within the state, or the terminal carrier within the state as the case may be. And no adequate remedy or provision is made or could be made in all cases, to provide a right of action in favor of the local carrier so victimised against the non resident carrier who was really at fault, as in this case defendant asserts the facts to be, because the courts of this state have — and cannot in all cases acquire jurisdiction over such non resident carriers to enforce such reimbursement, and cannot bring them into suits in the courts of this state, in all cases, so that judgments may be had or made binding against them, and as a result local companies of this state, if such law be so construed and applied, will be required, or may possibly be required, to pay out very large sums of money on account of the wrongs and the default of carriers in other states for whose wrongs and defaults the said local carriers are in no wise responsible by contract or otherwise, and for which they ought not in good conscience to be held liable; and such contributions might possibly become so great as to seriously cripple the local carriers and bankrupt them and deprive them of the right to further prosecute their business and the power to discharge their obligations to the people of the state;

Wherefore, defendant says that such act of Congress if it be so construed as to hold defendant liable in this case for the damages claimed, under the facts, and if it be applied and intended to apply as above indicated then and in that event it is violative of the state and federal constitution and is void.

8 W. B. TEAGARDEN,
G. B. FENLEY,
Att'ys for D'f'd't.

Filed Sept. 21" 1908.

First Supplemental Petition.

(Filed 9/21/08).

No. —.

L. V. WALLACE,
vs.
G., H. & S. A. RY. CO.

Now comes the plaintiff, and files this his first Supplemental Petition, excepting to, and in answer to deft's original answer in this case and says:

That he excepts generally to said answers, and says it shows no defense and prays the Judgment of the court.

MARTIN, OLD & MARTIN,
Att'ys for Pl'ff.

And excepting specially the plaintiff says said answer is insufficient in this—that the defendant pleads and sets up that under a contract with the plaintiff, it limited its liability to its own line, and that it delivered to its next succeeding carrier said Mohair, and prays Judgment. The plaintiffs excepts to said defense as set up, on the ground that it is no defense under the law—the act of Congress, called the Railroad Rate Bill which became a law in August, 1906, under which each receiving carrier is liable for freight lost, and may recover from his connecting carrier, or the Carrier who lost the goods—and prays this exception be sustained.

MARTIN, OLD & MARTIN,
Att'ys for Pl'ff.

Filed Sept. 21" 1908.

9 *Ruling of Court on Demurrers and Exceptions.*

(Filed 9/24/08.)

In County Court Uvalde County, Texas, September 21st, 1908.

L. V. WALLACE
vs.
G., H. & S. A. Ry. Co.

On this day this cause came on to be heard on the general demurrer & special exception of defendant, to plaintiff's first amended original petition filed herein on the 14th day of September 1908 and all parties appearing the same were submitted and duly considered and upon such consideration the Court finds that both the general demurrer and defendant's special exception are without merit and the same are therefore each in all things overruled to which ruling of the court defendant in open court promptly excepted:

And on the same day this cause coming on further to be heard on plaintiff's special exception to defendant's special answer containing in its 1st. amended answer this day filed which exception is embraced in plaintiff's first supplemental petition on this date filed all parties appearing the exception was submitted and considered and from such consideration the court finds that the matters and things set out in defendant's said special answer constitute no defense to plaintiff's cause of action and the said exception is therefore in all things sustained and said entire special answer is stricken out and excluded to which ruling of the court defendant in open court promptly excepted.

Filed Sept. 24" 1908.

Statement of Facts.

(Filed 9/25/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

10 Statement of Facts.

Be it remembered, that upon the trial of the above styled cause at the September term 1908 of the County Court of Uvalde County, Texas, the following were the facts, and all the facts, admitted in evidence:

The plaintiff, L. V. WALLACE, being called on his own behalf testified in substance that on the 10th day of October, 1906, the firm of Barnes Wallace & Co., of which he was then a member, delivered to the agent of defendant, at Uvalde, Texas, for shipment to the Massachusetts Mohair Plush Company, Lowell, Massachusetts, four bags of mohair, marks and weights as follows:

1 Bag	Mark-	B. W.	Weight	38 lbs.
1 "	"	J. S.	"	46 "
1 "	"	S. K.	"	364 "
1 "	"	F..	"	347 "

That on October 23rd 1906, said firm delivered to said agent another shipment of mohair, consisting of three bags to the same consignee, and destination, which bags were marked and weighed as follows:

2 Bags	Marked	W.	Weight	386 lbs.
1 Bag	"	T. H. S.	"	193 "

That on November 14th 1906, said firm delivered to said agent for transportation to the same consignee and destination three more bags of mohair of weight and marks as follows:

2 Bags	Marked	J. C. Pope	Weight	646 lbs.
1 Bag	"	J. G.	"	256 "

Plaintiff is shown and identifies the bills of lading issued on the shipments, being all made out on the same printed form, showing the number of bags with their marks and weights as testified to by plaintiff above, plaintiff then offered in evidence the following part of the bills of lading (all being alike except as to date number & description of the bags of mohair) towit:

"Galveston, Harrisburg and San Antonio Railway Company Bill of Lading."

11 Received by the Galveston, Harrisburg and San Antonio Railway Company in apparent good order and *well* condition, of Barnes, Wallace and Company, for delivery to Massachusetts Mohair Plush Company, or their assigns at Lowell, Massachusetts, he or they paying freight and charges as per margin, the following articles, — to say: (Here follow in appropriate columns the number, marks and weight of the bags; and following this description of the articles are some stipulations not offered by plaintiff, but subsequently offered by defendant and excluded by the Court.) In witness whereof, I as the agent of the Galveston, Harrisburg & San Antonio Railway Company, have signed said Bills of Lading, all of this tenor and date, one of which being accomplished the others to stand void:

Dated at Uvalde, Texas, this the 10th day of October, 1906.

(Signed) J. W. EVANS, *Agent.*

The other bills have date October 23rd and November 14th respectively, and with the exception of the description of the articles, were all identical. None of the bills were endorsed to plaintiff, or to any one; that is, they have no evidence of transfer to anyone.

Continuing, plaintiff testified that he had been buying and selling mohair about fifteen years. He himself did the most of the buying for the firm, and bought and inspected and handled all the mohair in the three shipments in question; was familiar with it, and knows its grade and condition, that he personally saw and examined all of said mohair before it was shipped.

He is the successor to Barnes Wallace & Co., and to all the assets and claims of said Company, including the one sued on in this case.

He stated he was by purchase the owner of the assets and claims due said firm of Barnes, Wallace & Co.,—and the owner of the claim sued for in this case. That the names of said firm were—Mrs. Mary Barnes, D. J. Sweeten and L. V. Wallace—that he alone now conducted the said mercantile business, in his own name, and

12 *was* the successor of said firm of Barnes, Wallace & Co.

Witness stated that the Bag marked F weighing 347 lbs. and the two bags marked J. C. Pope weighing 646 lbs., and 1 Bag marked W, weighing 109 lbs. was among the best mohair which had been shipped to said Mass. Mohair Plush Co., in grade class and quality. That the bag S. K. of which there was a shortage of 93 lbs. The T. H. S. bag of which there was a shortage of 3 lbs. and the Bag marked J. G. weighing 256 lbs. was of average grade, class and quality, with any of the mohair shipped to said Mohair Plush Co., by me in October and November, 1906.

He said that there was none of the mohair which had reached destination, of the mohair he had shipped, that was any better than that which had been lost, and the greater part not as good as the Bags marked F—J. C. Pope and W. The Bag F was Kid Mohair and the very best that was shipped. The Bag S. K. and T. H. S. and

J G. was all overage grade, kind and quality, with that which reached destination, and for which he was paid for by said Massachusetts Mohair Plush Co. That he had not received pay for the Mohair which had been lost, nor had it been returned to him.

Cross-examination:

Barnes, Wallace & Co. made a number of shipments of mohair from Uvalde the same year to the same consignees, in all some 25 or 30 bags. The F Bag was bought from O. C. Pope. They bought 3 or 4 bags from him besides this. Witness does not recall how they were marked.

The "S. K." bag was bought of S. K. Smith. Three sacks were bought from Smith. They were shipped later, some two or three weeks later.

The bags were marked by the growers with paint—that is lampblack made up with kerocene oil.

The bags marked "W" were bought from Mr. Martin. Two only were bought of him, and they were both included in the shipment.

The bag alleged to have been lost in this lot was kid mohair.

13 The T. H. S. bag was bought from T. H. Stephens. He does not recall how much he bought that season from Stephens.

The two J. C. Pope bags were bought of J. C. Pope. These were the only bags bought of him that season.

The J. G. Bag was bought from Jim Green.

The B. W. brand was the firm's own mohair produced on their own ranch. This output amounted to about 1200 lbs., and it was all shipped to the same consignees.

On one occasion he received a letter from the Massachusetts Mohair Plush Co. describing and making an offer on a bag of mohair from which he knew they had made a mistake. He had not shipped them any of that kind, and he wrote them about it. They claimed to have discovered their mistake before they got his letter. Usually he found their weights tallied with his within a few pounds.

As a matter of fact he does not himself know whether the Massachusetts Mohair Plush Co. got the mohair he is suing for or not.

The leading merchants and shippers and buyers of Uvalde ship mohair to that Company each year. They buy indiscriminately as it is brought in from the country by the producers, and ship it out. Others were shipping at the same time he was. Mohair all moves out in about two months of the fall, beginning the last days of September.

His shipments of October 10th, 23rd and November 14th, 1906, such as did go through, were not reported on by the consignees until February 1st 1908. It was all reported on in one letter.

Defendant offered in evidence the remaining portions of the bills of lading not offered by plaintiff, which was excluded on plaintiff's objections. Defendant then offered separately the several stipulations limiting defendant's liability to its own line &c., each of which was also excluded on plaintiff's objections.

DAVID HIRD testified by depo-ition, returned into court ——, 1908, as follows:

14 That he is 41 years of age, resides in Lowell, Massachusetts, and is the Boss Wool Sorter for the Massachusetts Mohair Plush Company at that place, and has been in their employ 12 years. He has charge of all the wool sorters employed by the Company, and of all the mohair and wool that is shipped to the Company for use in its business.

That he recollects to have received and handled for the Massachusetts Mohair Plush Company the following packages of mohair shipped to said Company by Barnes Wallace & Co. from Barksdale, between October 1st 1906 and April 1907, towit:

October 23, 1906, 2 bags marked O. C. P. weighing 628 lbs.
November 1, 1906, 2 bags marked D., weighing 506 lbs.
November 1, 1906, 2 bags marked D. S. weighing 530 lbs.
December 11, 1906, I bag marked D., weighing 300 lbs.
December 6, 1906, 1 bag marked W. weighing 277 lbs.
January 15, 1907, 1 bag marked T. H. S. weighing 190 lbs.
December 18, 1906, 1 bag marked B. W. weighing 37 lbs.
December 18, 1906, 1 bag marked J. S., or J. C. 45 lbs.
December 18, 1906, 1 bag marked S. K. weighing 271 lbs.
April 9, 1907, 3 bags marked D., weighing 758 lbs.
April 9, 1907, 1 bag marked T. W. weighing 169 lbs.

April 9, 1907, 1 bag marked  weighing 207 lbs.

April 9, 1907, 1 bag marked L. L. weighing 272 lbs.

April 15, 1907, 2 bags marked  weighing 549 lbs.

April 15, 1907, 2 bags marked  weighing 379 lbs.

April 25, 1907, 1 bag marked D. P. weighing 241 lbs.
April 19, 1907, 5 bags marked J. D. weighing 1178 lbs.
April 19, 3 bags marked G. W. weighing 624 lbs.
April 19, 1907, 1 bag marked S. K. weighing 186 lbs.

He did not receive 1 bag marked F., nor with a character resembling of the weight of 347 lbs., nor any bag so marked of any weight; nor did he receive 3 bags, two marked J. C. Pope, and one marked J. G., of the total of 902 lbs., or bags so marked of
15 any weight shipped from Uvalde station, Texas on November 14, 1906.

He did receive 1 bag marked S. K. of the weight of 271 lbs. shipped October 10, 1906, but did not receive a bag shipped on that date marked S. K., of the weight of 364 lbs.

He received 1 bag marked W., shipped October 23, 1906, from Uvalde, Texas, of the weight of 277 lbs., but did not receive a bag marked W. shipped on that date weighing 109 lbs.

He received a bag marked T. H. S., weighing 190 lbs. shipped October 23, 1906, but did not receive a bag of that mark weighing 193 lbs.

There is not now, nor has there been any other person or persons within the dates mentioned connected with or employed by the Massachusetts Mohair Plush Company except witness authorized — receive or make a record of mohair received or shipped to that Company. Witness is the only person now, or any time mentioned, empowered by said Company to receive mohair consigned to it. No other person or persons connected with or acting for and in behalf of said Mohair Plush Company has received the same or any portion of the mohair mentioned in his foregoing testimony other than himself, and no person, or persons within his knowledge acting for or in behalf of said Company has received any mohair from Barnes Wallace & Co. within the dates mentioned, other than has been stated by the witness.

There was a market value of the class of mohair received by the witness, per pound from Barnes & Wallace, at Lowell, Mass. between October 10, 1906 and April 1907, with which value he was acquainted. The value varied according to the grade of mohair consigned.

In October 1906, some grades received sold at 30 cts. per lb., others were of the value of 25 cts. per pound, and some of the market value of 20 cts. per pound, and these were the prices for the same grade at Lowell, Mass. during November and December, 1906. In March and April, 1907, the market value of the grades of
16 mohair was less than in the fall of 1906. In the months of March and April, 1907, the market value was about 17 cts. on grades shipped by plaintiffs. The average price of the mohair which the witness did receive, as previously stated, from Barnes Wallace & Co., in Lowell, Mass. was on the dates mentioned 24 cts. per pound.

The bag marked W., and the bag marked T. H. S. 26½ cts. per pound. They were sold the 25 of January, 1907, and the prices received were reasonable and was the fair market value of the same. The witness says he knows nothing about what was done by the Mohair Plush Company respecting the payment of freight charges on the mohair. Mr. Rylah Firth, the cashier of the Company, attends to such matters.

Cross-examination:

He is an Englishman and says he was born and raised in England, and came to this country in 1891.

After reaching the age of 21 years he became a wool sorter, working for a firm in England, for whom he continued to work 3 years. He then came to the United States and worked as wool sorter for 5 years for a worsted company and then took employment 12 years ago with his present employer—Massachusetts Mohair Plush Company.

In the fall of 1906, the Massachusetts Mohair Plush Co. employed two or three hundred persons. They had one warehouse or place only at which mohair was received. Some mohair was received direct from the railroad on a spur track to the Company's works, and some loads were brought on trucks, principally by a transportation company that did heavy trucking for most of the corporations.

The mohair received was made into yarn by the Company, and sold, and some of the stock was made into plushes for sale. None of it was resold, but always used in manufacturing by the Company. The ware-house is within a few feet of the factory, and about 20 yards from the office. Wool and mohair were the only pro-
17 ductions received there.

About 90 per cent of the mohair received came in trains, and 10 per cent in drays.

Witness was the only person who did the checking in of the mohair from November 1906 to March 1907. No other person had anything to do with it. When mohair was delivered from the cars he checked the bags as they were taken from the car, and then again he weighed them. He inspected each bag and made note of each identification mark on each bag as it came out of the wagon. This he did in person in the ware-house, that being the place where the bags were delivered from the cars or drays. He made a written record of this checking, and noted thereon any shortage in the articles or in the weight. The original checking was made on a block of paper and then transferred to his book. This original block or record was thrown away or destroyed after being transferred, and he cannot now produce it.

He checked the mohair from Barnes Wallace & Co. from the letters and bills of lading sent with the goods from the consignor and then returned these papers to the office of the Company. From there they were sent to the Company's office in Boston, Massachusetts where he supposes they now are in the custody of the Company. His reports made at the time of the checking and the invoices were sent with the reports to the Company's office in Lowell.

He personally inspected and weighed every bag of mohair received by his employer from November 1906 until March 1907.

It is not true that during that time at intervals other persons from time to time checked in the mohair and other things received by his employers at that ware-house and factory. He in person inspected and weighed each and every bag received by them from November 1st, 1906, to May 1st, 1907. He inspected and weighed each bag as it came from the drays or cars during that time, and the inspecting was not done by any other person.

18 He identified the shipment by the marks or tags thereon and by the information received from the consignors that accompany the goods or applied thereto. He used a block or paper, as before stated, which he cannot now attach for reasons already shown.

His employer received a great quantity of mohair from Texas and other places. About four or five hundred bags per month.

It is true that from time to time his employer received bags of mohair which lacked marks of identification, and which, because of loss of marks and tags could not be applied to any particular invoice. Bags of mohair were received which could not, with absolute certainty be designated as belonging to my particular shipment.

It is not true that at the end of the receiving season there is a number of bags of mohair on hand, the ownership or identity of which was never with certainty located. At the present there are about 10 bags that have not been identified, and they are subject to

the order of the railroad tracer. There are times when the bags do not correspond in description with the information given by the consignors, and there has elapsed sometime before the identity could be determined by further information obtained from the consignor.

About a half a dozen bags of doubtful identity were received during that season. They are now in the warehouse waiting instructions of the railroad. None of the bags bear the marks or correspond with the information given by the consignors. The matter is usually disposed of by the railroad company in its efforts to trace lost or miscarried bags.

There are three or four bags that have been in the warehouse since December 1906. Witness is the only person who identifies the bags at the warehouse, and this is done soon after it is received. There are delays in the receipt of mohair shipped at the same time and place. That is, a part of the goods arrive at one time and a part at another time. It does not occur very often. The extreme limit of time of such delays is 5 or 6 weeks.

The railroads from which said Mohair Plush Company received mohair, are the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad. The switches of the former reach his employer's warehouse. The latter Company use the same tracks and switch consignments to the Company's warehouse on them.

The Stanley Transportation Company of Lowell carries all stock to his employer's warehouse that did not come by rail. The distance they haul it was about half a mile. (The Stanley Transportation Company is a private trucking Company.)

The floor hands did the trucking of the mohair while witness did the checking. The names of the floor hands are given.

Witness has been engaged in the purchase and sale of mohair in the City of Lowell, Mass. for the Massachusetts Mohair Plush Company since the spring of 1905. He explains the foregoing by this statement: "That he does not buy the mohair but examines the mohair when it is received, and checks it and reports to his employer."

There are many grades of mohair, fine, medium, coarse, long, and short, clear and kempy. The wool sorters at his employer's mill make about 14 different grades of mohair. Witness cannot give the commercial name of the different grades and give the difference in value per pound between the several grades.

It is true that the lengths and fineness of the fiber, as well as dirt, burs and color have much to do with the class and grade of mohair; and it is true that a great many things have to be considered to determine its grade, and no man can grade it without seeing it and giving it a personal examination.

His employer received from Texas points from November, 1906, to April, 1907, about 2,000 bags of mohair. From New Mexico about 330 bags. From Arizona about 200 bags and from Turkey about 800 bags.

Witness has refreshed his memory in this matter from his receiving book referred to for the purpose of answering the interrogatories that have been put to the witness, concerning dates, time of shipment, places of shipment &c. It is in his

possession. It is a large book of 450 pages, and it is, therefore, impossible to attach it to his answers, or to attach a copy of it.

RYLAH FIRTH, a witness for plaintiff, testified in substance that he resides at Lowell, Massachusetts, and is the Paymaster for the Massachusetts Mohair Plush Company. He does not know that his said employer received any mohair from Barnes Wallace & Co. between October 10th 1906 and May 1st 1907. The railroad company at Lowell, Mass. presented to his employer an account of freight and advance charges of mohair from Texas, which was assumed to be an account of shipment from Barnes Wallace & Co. of Barksdale, Texas, because of a correspondence in a number of the bags and weight between the statement from the railroad company and shipping receipts from Barnes Wallace & Co. received from them at about the same time.

Freight on mohair is paid not as the mohair is received, but as called for by the railroad company, on their vouchers or statements as above stated.

Witness did not of his own knowledge know anything about the receipt of the mohair in question. That is known to Mr. Hird, who checked the mohair when received. Witness' respective place is in the office and has nothing personally to do with the checking of merchandise received.

The freight rate per 100 lbs., on mohair from Uvalde, Texas, to New York is $1.45 and from New York to Lowell, 17 cts.

Under the rule prevailing at the factory, freight bills are paid at the end of each week where the goods are delivered or undelivered, as per bills rendered by railroad company with vouchers for same. This was the arrangement with the railroad company. Said freight was paid to the Boston & Maine Railroad Company.

Cross-examination:

21 During the winter of 1906 and spring of 1907, the Massachusetts Mohair Plush Company employed about 360 people.

There was only one place or warehouse at which mohair was received. Some were received from cars and some from drays. The drays were owned by the transfer Companies. Mohair coming in cars was brought within a short distance to the receiving room and then trucked to the receiving room by hand and where the bags were weighed and checked. Mohair received by drays was unloaded on the platform and trucked by hand to the receiving room.

His employers were engaged in manufacturing plushes and yarns. The mohair bought was usually for manufacturing in the business of the Company; that is, it was not sold for profit or on commission. The receiving room was a part of the factory.

Cotton yarn was also received for weaving purposes. Witness did not check the mohair. That was done by David Hird who had charge of that work.

All papers used in connection with shipment are sent to the Boston office and there filed. Witness know- nothing about the checking of mohair; that was *was* not a part of his employment. David Hird was employed to do that work.

It is true that from October 1, 1906, to May 1st, 1907 large quantities of mohair were received by his employers from Texas and other places. He cannot give, however, the numbers of bags per month. It is not in the line of his work. David Hird generally attended to the establishment of the identity of the bags of mohair with the several consignments, and witness had nothing to do with it, and knows nothing about when and where this was done and how long after arrival of mohair. It is true that parts of shipments are sometimes delayed, but he cannot give an estimate of the interval intervening between the shipments.

The Boston & Maine Railroad and the New York, New Haven & Hartford Railroad are the roads over which his employers receive mohair. The former has track facilities to his employer's
22 warehouse. The latter sometimes run cars to his employer's warehouse over the former's tracks. When drays are used to deliver mohair, they haul it a distance of half a mile from one freight house, and about a mile and a quarter from the other freight house. The Stanley Transportation Company performs this service.

We hereby agree that the within and foregoing statement is a true and correct statement of all the facts introduced in evidence at the trial of this case, and that the same, after having the approval of the court, shall be filed and made a part of the record, and shall be transmitted to the Court of Civil Appeals, as provided by law, and there accepted and acted upon as the statement of facts in this case.

MARTIN, OLD & MARTIN,
Attorneys for Plaintiff.
W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

The foregoing statement of facts having been agreed to by the parties, was this day submitted to me for inspection and approval, and after examination of the same, I find it a true statement of all the material evidence in the case the same is found by me to be correct, and is, therefore, now approved and the Clerk of this Court is hereby ordered to file the same and make it a part of the record of this cause, and to transmit it in its original form under his certificate and seal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, along with the transcript in this case, as provided by law.

This September 25th, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

23 Pending in the County Court, Uvalde County, Texas.

No. 462.

L. V. WALLACE
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

I, Zena Dalrymple, Clerk of the County Court in and for Uvalde County, Texas, do hereby certify that the above and foregoing 16 pages is the original statement of facts filed in this cause, and approved by the court and the same which I have been directed to certify to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, along with the record in this cause on appeal.

Given under my hand and seal of office, this 23 day of November, 1908.

[SEAL.] ZENA DALRYMPLE,
County Clerk, Uvalde County, Texas.

Filed Sept. 25", 1908.

Charge of the Court.

(Filed 9/21/08.)

In the County Court of Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Gentlemen of The Jury:

1st. You are instructed by the Court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a Common Carrier, and as such Common Carrier, is liable to any person who deliver- freight to it, or its duly authorized agents, for transportation from a point in one state to a point in the same, or any other state, of this Union, said freight being received by said defendant at the one point, and billed by it to the other point,
24 for any damage, or loss accruing to said freight, after such receipt, and before delivery to the consignor to point of destination; provided said damage was not caused by some Act of God, or at the hands of a public enemy.

2nd. You are further instructed by the Court that if you believe from a preponderance of the evidence in this case, that the plaintiff, L. V. Wallace is the successor of the firm of Barnes, Wallace & Co., and as such successor, if you find he is such successor, is the owner of the assets of said late firm, and particularly of the claim, if any,

involved in this suit: And if you further believe from a preponderance of the evidence in this case, that said Barnes, Wallace & Co., on Oct. 10th 1906, and Oct. 23rd 1906, and Nov. 14th, 1906, delivered the Mohair Alleged by plaintiff to have been so delivered on said respective dates, and further find that said Mohair, if any, was received by the defendant, at Uvalde, Texas, and shipped and billed by defendant from Uvalde, Texas, to the Massachusetts Mohair Plush Co. at Lowell, Mass: And if you further find that all or any part of such Mohair, if any, never reached Lowell, Massachusetts, or was never delivered to said Massachusetts Mol air Plush Co. then if you so find, you will find for the plaintiff.

3rd. If you find in favor of the plaintiff under the foregoing paragraphs of this charge: then you will determine from the evidence in this case, how many pounds of said mohair was not delivered to said Massachusetts Mohair Plush Co. if you find that any was not so delivered; then you will find from the evidence the market value, if any, of such mohair as was not so delivered, if any, at Lowell, Massachusetts, at the time and in the condition, the same should have arrived at Lowell, Mass., if the same had been transported with reasonable care and diligence, and find your verdict for plaintiff in such sum as found by you to have been the market value of said Mohair not so delivered.

4th. In a civil suit, the plaintiff is required to prove all the material facts necessary to his cause of action, by a preponderance
25 of the evidence.

5th. You are the exclusive judges of the credibility of the witnesses and weight to be given to their testimony but the law you will receive from the Court and be governed thereby.

W. D. LOVE,
County Judge, Uvalde County.

Filed Sept. 21", 1908.

Verdict of the Jury.

We the Jury find for the Plaintiff in the sum of $414.92.

E. GRAY, *Foreman.*

Decree of the Court.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

On this the 21st day of September 1908, came on to be heard the above numbered and styled cause and came the plaintiff by his attorney, and the defendant by its attorney, and both parties announced ready for trial and came a jury of six good and lawful men, viz: E. Gray, and five others, who after being duly tried, were impanelled and sworn in accordance with law, and after hearing the

pleadings read, and all the evidence, and the argument of counsel and the charge of the Court, retired to consider of their verdict, and returning again in open court delivered the following verdict,
26 to-wit: "We the Jury find for the Plaintiff in the sum of $414.92, E. Gray, foreman." Therefore, it is the order of the Court that the said verdict be in all things approved, and that the same be filed and entered of record. And in accordance with said verdict it is the order and Judgment of the Court, that the Plaintiff L. V. Wallace do have and recover of and from the defendant the Galveston, Harrisburg and San Antonio Railway Co. the sum of Four Hundred and Fourteen Dollars and ninety-two cents, with six per cent interest per annum from January 1st, 1908, and all costs in this behalf expended, for all of which let execution issue.

Defendant's Motion for New Trial.

(Filed 9/22/08.)

Pending in County Court, September Term, September 22d, 1908

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Now comes the defendant and moves the court that the verdict and judgment rendered against it in this cause be set aside and a new trial granted it for the following reasons:

First. The court erred in overruling defendant's general demurrer to plaintiff's petition.

Second. The court erred in overruling each of defendant's special exceptions to plaintiff's petition.

Third. The court erred in overruling defendant's motion to suppress the deposition of David Hird for reasons stated in the first and Second paragraph- of its motion to suppress the deposition of said witness Hird, each of which objections are referred to & made a part hereof.

Fourth. The court erred in overruling the 2d, 3d, 5th, 6th, 7th, 8th, 9th, 10th, 11th & 12th, paragraphs of defendant's motion
27 to suppress & strike out the several parts of the deposition of said witness David Hird in each paragraph criticised and defendant now refers to each and all of said paragraphs of the motion and makes them a part hereof.

Fifth. The court erred in sustaining plaintiff's special exception to defendant's special answer and in striking out defendant's special answer wherein it set up the stipulations with contract of shipment limiting its liability for loss and damage to its own line & releasing it from all liability after delivery of the mohair to its next connecting carrier.

Sixth. The court erred in refusing to allow defendant to offer in

evidence all the stipulations of the contract not offered by plaintiff.

Seventh. The court erred in refusing to allow defendant to offer in evidence that special stipulation in the contract releasing it from loss of or damage to, the Mohair after delivery to its connecting carrier.

Eighth. The court erred in charging the Jury in effect that defendant, upon proof that the mohair was delivered to it for transportation as charged by plaintiff would be liable to plaintiff for the value thereof absolutely if it was not delivered to consignee—that is if it was lost.

Ninth. The court erred in permitting plaintiff to testify in substance that he was the successor to Barnes Wallace & Co. and had acquired their rights to the Mohair;

Tenth. The verdict and judgment are contrary to law contrary to the facts and against the overwhelming weight of the facts and without facts to support them in this Plaintiff in this case is not shown to be the owner of the property sued for and had no right to maintain the action. It was not shown that the property was not in fact delivered to the consignee at destination. It was not shown by any competent evidence where & by whom the Mohair was lost if lost at all. And it is not shown that this defendant was guilty of any fault or wrong on the contrary the Mohair was delivered by
28 it to its connecting carrier & was given by it to the next carrier & so on until it passed into the hands of the last carrier.

Wherefore defendant prays that the verdict and Judgment be set aside and a new trial granted.

W. B. TEAGARDEN,
G. B. FENLEY,
Att'ys for D'f'd't.

Filed Sept. 22", 1908.

Order Overruling Motion for New Trial.

(Filed 9/24/08.)

In County Court, Uvalde County, September Term, September 12th, 1908.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

On this day this cause came on to be heard on defendant's motion for a new trial all parties appearing the motion was duly submitted & considered by the court and after a full hearing of same the court is of the opinion that the motion is without merit and the same is therefore in all things overruled and denied:

To this ruling of the court the defendant, in open court excepted and gave notice of appeal to the court of civil appeals for the Fourth

Supreme Judicial District of Texas sitting at the City of San Antonio, Texas.

And upon the motion of defendant it is further ordered that the defendant be allowed the full space of twenty days from and after the adjournment of this court within*g* which to settle and file its bills of exception and that it shall have thirty days after adjournment of this court within which to file a statement of facts in this case. Filed Sept. 24", 1908.

29 *Bill of Exception No.* 1.

(Filed 9/25/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Be it remembered that upon the trial of this cause plaintiff having offered in evidence certain other parts of the bills of lading (all the three bills of lading being substantially alike) de*f*endant then offered in evidence the following parts of the bills, to-wit:

"It is understood and expressly stipulated that the liability of the Galveston, Harrisburg and San Antonio Railway Company shall cease upon delivery to its next connecting line, of the goods, merchandise and produce mentioned herein."

It is also further stipulated and agreed that in the event the articles herein mentioned being conveyed by water transportation enroute to destination, they shall be subject to all customary conditions of the same, and the dangers of navigation, perils of the sea, and loss or damage by fire or water are excepted from carriers' liability".—"Neither this company, nor any of its connections or transfer lines which receive and transport said property will be responsible for damages—nor for loss or damage caused by—fire or any cause whatever not due to the Company's negligence—all of which is made a part of the terms and conditions of this bill of lading."

Which testimony was objected to by plaintiff because it is immaterial and irrelevant; and because defendant having received the mohair for transportation, as shown by the contract, it became liable absolutely for failure to deliver at destination, and it could not under the law limit its liability as in that part of the contract it attempted to do, and the stipulation being in controvention of the act of Congress of the United States of June, 1906, and against
30 public policy, are void.

Which objections were subtained by the Court, and the testimony was excluded for the reasons stated in the objection to which ruling of the court defendant then and there promptly ex-

cepted, and now tenders this its bill of exception thereto, and prays the court that the same be approved and ordered filed and made a part of the record in this case.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Correct:
MARTIN, OLD & MARTIN,
Att'ys for Pl'ff.

This bill of exception is hereby approved and ordered filed and made a part of the record in this case.
This the 25" day of September, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Filed Sept. 25, 1908.

Bill of Exception No. 2.

(Filed 9/25/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Be it remembered that upon the trial of this cause plaintiff having offered in evidence certain parts of the bills of lading (all being alike) showing the receipt of the mohair in question by defendant, for transportation, and showing the weight marks consignee and destination of it and concluding sentence signature &c. defendant then offered in evidence other stipulations therein reading as follows:

31 "It is understood and expressly stipulated that the liability of the Galveston, Harrisburg & San Antonio Railway Company shall cease upon delivery to its next connecting line, of the goods, merchandise and produce mentioned herein."

"Neither this company nor any of its connections or transfer lines which receive and transport said property, will be responsible for damages (for certain causes not offered), or for any cause whatever not due to the company's negligence."

Which testimony was objected to by plaintiff, because it is immaterial and irrelevant, and because defendant having received the mohair for transportation, as shown by the contract it became liable for its safe delivery at destination, and it could not under the law limit its liability as in that part of the contract it attempted to do; and the stipulations being in contravention of the act of Congress

of the United States of June, 1906, and against public policy are void.

Which objections so made were sustained by the court and the testimony excluded for the reasons stated in the objections. To this ruling of the court, the defendant then and there promptly excepted, and it now tenders this its bill of exception thereto, and prays the court that the same be approved and ordered filed and made a part of the record in this case.

W. B. TEAGARDEN &
G. B. FENLEY,
Att'ys for Defendant.

Correct:
MARTIN, OLD & MARTIN,
Att'ys for Plaintiff.

This bill of exception is hereby approved and the Clerk of this court is hereby ordered to file the same and make it a part of the record in this cause.

This 25" day of September, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Filed Sept. 25, 1908.

32 *Bill of Exception No. 3.*

(9/25/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Be it remembered that upon the trial of this case, and while the plaintiff, L. V. Wallace, was upon the witness stand testifying in his own behalf, the following question was propounded to him, to-wit:

"Q. Mr. Wallace, please state whether or nor you are the successor to Barnes, Wallace & Co., and to all the assets and claims due that company?

To this question, and to the answer thereto, whatever it might be, defendant objected, because the question involved a mixed question of law and fact and the answer would be a conclusion of the witness, and an invasion of the province of the jury, and because the evidence offered is not the best evidence of his right to this cause of action, but is secondary: All of which objections were overruled by the Court and the witness was, in answer *the* the question, permitted to testify that he was the successor to Barnes, Wallace & Co. and to all the claims and assets of said company, including the one sued on in

this case: To all of which ruling and action of the court, defendant promptly excepted and it now tenders this its bill of exception thereto and prays the court that it be approved and ordered filed, and made a part of the record in this cause.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Correct:
MARTIN, OLD & MARTIN,
Att'ys for Plaintiff.

33 This bill of exception is now approved with the following qualification. The witness L. V. Wallace stated that he was by purchase the owner of the assets and claims due said Barnes, Wallace & Co. and also the owner of the claim here sued on—that he now, alone conducted the said mercantile business, in his own name, and was the successor of said firm of Barnes, Wallace & Co.—and with this qualification it is: ordered that same be filed and made a part of the record in this cause.

This September 25th, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Filed Sept. 25, 1908.

Appeal Bond.

(Filed 10/15/08.)

Pending in the County Court of Uvalde County, Texas.

No. 462.

L. V. WALLACE
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Whereas, in the above styled and numbered cause pending in said court, the plaintiff L. V. Wallace on the 21st day of September, 1908, recovered a judgment against the defendant, Galveston Harrisburg & San Antonio Railway Company for the sum of Four Hundred and fourteen and 92/100 ($414.92) Dollars with interest, and for costs; and said defendant's motion for new trial having been overruled and notice of appeal given, said defendant desires to appeal said cause to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and desires also to suspend the execution of said judgment pending such appeal.

34 Now, therefore, we the said Galveston, Harrisburg & San Antonio Railway Company as principal and The United States Fidelity & Guaranty Company as surety, acknowledge ourselves bound to pay to the said L. V. Wallace, plaintiff, the sum of One Thousand ($1000.00) Dollars, conditioned that the said Gal-

veston Harrisburg & San Antonio Railway Company shall prosecute its said appeal with effect; and in case the judgment of the Supreme Court of Civil Appeals shall be against it, that it shall perform its judgment, sentence, or decree, and pay all such damages as said court may award against it.

Witness our hands this the 29th day of September, 1908.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,

By its agent & attorney,

W. B. TEAGARDEN.

[SEAL.] THE UNITED STATES & GUARANTY COMPANY,

By EDWD. R. LEWIS AND E. P. PHELPS,

Its Attorneys in Fact.

I have fixed the probable amount of costs in the above numbered and entitled cause, in the Supreme Court, in the Court of Civil Appeals and in the Court below at the sum of $50.00 Fifty Dollars, and approve the foregoing bond on this the 15th day of October, 1908.

ZENA DALRYMPLE,
County Clerk, Uvalde County, Texas.

Filed Oct. 15" 1908.

Assignment of Errors. (*Filed* 11/18/08.)

In the County Court, Uvalde County, Texas.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

35 *Assignment of Errors by Defendant.*

Now comes defendant and complains that manifest errors were committed by the court at the trial of this cause to its prejudice and which it desires reviewed on appeal as follows:

First Error. The Court erred in overruling defendant's general demurrer, because plaintiff's petition stated no cause of action over which the court has jurisdiction. On the contrary the cause of action stated in the petition is one created by the Act of Congress of the United States of June 29th, 1906, and one over which the courts of the United States and the Interstate Commerce Commission alone have jurisdiction.

Second Error. The court erred in sustaining plaintiff's special exception contained in his First Supplemental Petition, to all that part of defendant's special answer wherein it is claimed, in sub-

stance that the Mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment, whereby defendant contracted only to safely carry the Mohair and deliver it to the next connecting carrier, after which its liability should cease; And wherein it is further claimed that said contract was in all things strictly complied with, and the Mohair, if lost at all, was lost by one of the connecting carriers and not by defendant.

Third Error. The court erred in excluding from the jury, when offered in evidence by defendant, certain stipulations and parts of the bill of lading which read as follows:

"It is understood and expressly stipulated that the liability of the Galveston, Harrisburg & San Antonio Railway Company shall cease upon delivery to its next connecting line, of the goods, merchandise and produce mentioned herein.

"Neither this company nor any of its connections or transfer lines which receive and transport said property, will be responsible for damages (for certain causes not offered), or for any cause whatever not due to the company's negligence."

All of which more fully appears in Bill of Exception No.
36 2, which is made a part hereof.

Fourth Error. The court erred in the second paragraph of the Main Charge, which reads as follows:

"You are further instructed by the Court that if you believe from a preponderance of the evidence in this case, that the plaintiff, L. V. Wallace is the successor of the firm of Barnes, Wallace & Co., and as such successor, if you find he is such successor, is the owner of the assets of said late firm, and particularly of the claim, if any, involved in this suit: And if you further believe from a preponderance of the evidence in this case, that said Barnes, Wallace & Co. on Oct. 19th 1906, and Oct. 23rd, 1906, and Nov. 14th 1906, delivered the Mohair alleged by plaintiff to have been so delivered on said respective dates, and further find that said Mohair, if any, was received by the defendant, at Uvalde, Texas, and shipped and billed by defendant from Uvalde, Texas, to the Massachusetts Mohair Plush Co. at Lowell, Mass.: And if you further find that all or any part of such Mohair, if any, never reached Lowell, Mass., or was never delivered to said Massachusetts Mohair Plush Co. then if you so find, you will find for the plaintiff."

Fifth Error. The court erred in the 1st paragraph of the Main Charge, which reads as follows.

"You are hereby instructed by the Court, that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common Carrier, and as such Common Carrier, is liable to any person who delivers freight to it, or its duly authorized agents, for transportation from a point in one State, to a point in the same, or any other state, of this Union, said freight being received by said defendant at the one point, and billed by it to the other point, for any damage, or loss accruing to said freight, after such receipt, and before delivery to the consignee, at point of destination, provided said damage was not caused by some Act of God, or at the hands of a public enemy."

Sixth Error. The court erred in refusing defendant a new trial on its motion, because the verdict and judgment are wholly without
facts to support them, and are contrary to law and against
37 the overwhelming weight of the facts, in that plaintiff wholly
failed to show that the Mohair in question was lost or damaged and was not delivered at destination. In fact, it appeared from the undisputed facts that the consignees have still in their possession and have had for many months, a number of unclaimed sacks of Mohair exceeding the number and amount claimed by plaintiff to have been lost, which Mohair consignees are unable to identify because the marks have been lost and defaced, and which Mohair is now being held for identification by the consignees, and plaintiff's Mohair is no doubt in the lot.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant, G., H. & S. A. Ry. Co.

Filed Nov. 18" 1908.

Cost Bill.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY CO.

G., H. & S. A. Ry. Co., Dr., to Officers of Court.

Clerk's Costs.

Docketing,	$.1
Citation & Copy,	.5
Filing 30 papers,	1.5
Motion to Suppress Dep.,	.5
Order of Court,	.5
Copies Direct & Cross Interrogatories David Hird,	1.6
Copies Direct & Cross Interrogatories Rylah Firth,	1.3
1 precept,	.5
38 2 commissions,	1.0
Jury & Verdict,	.5
2 appearances,	.2
Judgment,	.5
Continuance,	.1
Costs,	.2
	$8.9
County Judge	3.0

Sheriff & Constable Costs.

Citation,	$.90
Precept,	.75
Jury fee,	.50
	$2.15
Jury fee pd. by Dfdt.,	5.00
Notary Public, J. J. Hickman,	$15.00
Notary Public, J. J. Hickman, taking Dep.,	15.00
	$30.00

Recapitulation.

Jury fee,	$5.00
County Clerk,	8.95
County Judge,	3.00
Sheriff & Constable,	2.15
Notary Public,	30.00
Grand total,	$49.10

Certificate.

THE STATE OF TEXAS,
County of Uvalde:

I, Zena Dalrymple, Clerk of the County Court in and for
39 Uvalde County, Texas, hereby certify that the above and foregoing 34 pages contain a true and correct transcript of all proceedings had in cause No. 462, L. V. Wallace, vs. G., H. & S. A. Ry. Co., as same appears on file in this office.

Given under my hand and seal of office, this 4th day of December, A. D., 1908.

[SEAL.]

ZENA DALRYMPLE,
Clerk County Court, Uvalde County, Texas.

Statement of Facts.

(Filed 1/12/09.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 462.

L. V. WALLACE
vs.
G., H. & S. A. RY. CO.

Statement of Facts.

Be it remembered, that upon the trial of the above styled cause at the September 1908, term of the County Court of Uvalde County,

Texas. the following were the facts, and all the facts, admitted in evidence:

The plaintiff, L. V. WALLACE, being called on his own behalf testified in substance that on the 10th day of October, 1906, the firm of Barnes Wallace & Co., of which he was then a member, delivered to the agent of defendant, at Uvalde, Texas, for shipment to the Massachusetts Mohair Plush Company, Lowell, Massachusetts, four bags of mohair, marks and weights as follows:

1 Bag		Mark-	B. W.	Weight	38 lbs.
1 "		"	J. S.	"	46 "
	1 Bag	"	S. K.	"	364 "
40	1 Bag	Mark-	F	Weight	347 lbs.

That on October 23rd 1906, said firm delivered to said agent another shipment of mohair, consisting of three bags to the same consignee, and destination, which bags were marked and weighed as follows:

2 Bags	Marked	W	Weight	386 lbs.
1 Bag	"	T. H. S.	"	193 "

That on November 14th 1906, said firm delivered to said agent for transportation to the same consignee and destination three more bags of mohair of weight and marks as follows:

2 Bags	Marked	J. C. Pope	Weight	646 lbs.
1 "	"	J. G.	"	256 "

Plaintiff is shown and identifies the bills of lading issued on the shipments, being all made out on the same printed form, showing the number of bags with their marks and weights as testified to by plaintiff above plaintiff then offered in evidence the following part of the bills of lading (all being alike, except as to date, number & description of the bags of mohair) to-wit:

"Galveston, Harrisburg and San Antonio Railway Company Bill of Lading."

Received by the Galveston, Harrisburg and San Antonio Railway Company in apparent good order and *well* condition, of Barnes Wallace & Company, for delivery to Massachusetts Mohair Plush Company, or their assigns at Lowell, Massachusetts, he or they paying freight and charges as per margin, the following articles, — to say: (Here follow in appropriate columns the number, marks and weight of the bags; and following this description of the articles are some stipulations not offered by plaintiff, but subsequently offered by defendant and excluded by the Court) In witness whereof, I as the agent of the Galveston, Harrisburg & San Antonio Railway Company, have signed said Bills of Lading, all of this tenor and date, one of which being accomplished the others to stand void:

41 Dated at Uvalde, Texas, this the 10th day of October, 1906.

(Signed) J. W. EVANS, *Agent.*

The other bills have date October 23rd and November 14th respectively, and with the exception of the description of the articles, were all identical. None of the bills were endorsed to plaintiff, or to any one; that is, they have no evidence of transfer to anyone.

Continuing, plaintiff testified that he had been buying and selling mohair about fifteen years. He himself did the most of the buying for the firm, and bought and inspected and handled all the mohair in the three shipments in question; was familiar with it, and knows its grade and condition, that he personally saw and examined all of said mohair before it was shipped.

He is the successor to Barnes, Wallace & Co., and to all the assetts and claims of said Company, including the one sued on in this case.

He stated he was by purchase the owner of the Assetts and claims, due said firm of Barnes, Wallace & Co., and the owner of the claim sued for in this case. That the names of said firm were, Mrs. Mary Barnes, D. J. Sweeten and L. V. Wallace.—that he alone now conducted the said mercantile business, in his own name, and *was* the successor of said firm of Barnes, Wallace & Co.

Witness stated that the bag marked $\widehat{\times}$ weighing 347 lbs. and the two bags marked J. C. Pope weighing 646 lbs. and 1 bag marked W, weighing 109 lbs., was among the best mohair which had been shipped to said Mass. Mohair Plush Co. in grade class and quality. That the bag marked S. K. of which there was a shortage of 93 lbs. The T. H. S. bag of which there was a shortage of 3 lbs., and the Bag marked J. G. weighing 256 lbs. was of average grade, class and quality with any of the mohair shipped to said Mohair Plush Co. by me in October and November, 1906.

He said that there was none of the mohair which had reached destination, of the mohair he had shipped, that was any better than that which had been lost and the greater part not as
42 good as the Bags marked $\widehat{\times}$ J. C. Pope and W. The Bag was kid mohair and the very best that was shipped. The Bag S. K. and T. H. S. and G was all of average grade, kind and quality, with that which reached destination, and for which he was paid for by said Massachusetts Mohair Plush Co. That he had not received pay for the mohair which had been lost, nor had it been returned to him.

Cross-examination:

Barnes, Wallace & Co. made a number of shipments of mohair from Uvalde, the same year to the same consignees, in all some 25 or 30 bags. The $\widehat{\times}$ Bag was bought from O. C. Pope. They bought 3 or 4 bags from him besides this. Witness does not recall how they were marked.

The bags were marked by the growers with paint—that is lampblack made up with Kerocene oil.

The Bags marked "W" were bought from Mr. Martin. Two only were bought of him, and they were both included in the shipment. The bag alleged to have been in the lost in this lot was kid mohair

The T. H. S. bag was bought from T. H. Stephens. He does not recall how much he bought that season from Stephens.

The two J. C. Pope bags were bought of J. C. Pope. These were the only bags bought of him that season.

The J. G. bag was bought from Jim Green.

The B. W. brand was the firm's own mohair produced on their own ranch. This output amounted to about 1200 lbs., and it was all shipped to the same consignees.

On one occasion he received a letter from the Massachusetts Mohair Plush Co. describing and making an offer on a bag of mohair from which he knew they had made a mistake. He had not shipped them any of that kind, and he wrote them about it. They claimed to have discovered their mistake before they got his letter. Usually he found their weights tallied with his within a few pounds.

As a matter of fact he does not himself know whether the Massachusetts Mohair Plush Co. got the mohair he is suing for or not.

43 The leading merchants and shippers, and buyers of Uvalde ship mohair to that company each year. They buy indiscriminately as it is brought in from the country by the producers, and ship it out. Others were shipping at the same time he was. Mohair all moves out in about two months of the fall, beginning the last days of September.

His shipments of October 10th, 23rd and November 14th 1906, such as did go through, were not reported on by the consignees until February 1st, 1908. It was all reported on in one letter.

Defendant offered in evidence the remaining portions of the bills of lading not offered by plaintiff, which was excluded on plaintiff's objections. Defendant then offered separately the several stipulations limiting defendant's liability to its own line, &c., each of which was also excluded on plaintiff's objections.

DAVID HIRD testified by deposition, returned into court ——, 1908, as follows:

That he is 41 years of age, resides in Lowell, Massachusetts, and is the Boss Wool Sorter for the Massachusetts Mohair Plush Company at that place, and has been in their employ 12 years. He has charge of all the wool sorters employed by the Company, and of all the mohair and wool that is shipped to the Company for use in its business.

That he recollects to have received and handled for the Massachusetts Mohair Plush Company the following packages of mohair shipped to said Company by Barnes Wallace & Co. from Barksdale, Texas, between October 1st, 1906, and April 1907, to-wit:

October 23, 1906, 2 bags marked O. C. P. weighing 628 lbs.
November 1, 1906, 2 bags marked D., weighing 506 lbs.
November 1, 1906, 2 bags marked D. S. weighing 530 lbs.
December 11, 1906, 1 bag marked D., weighing 300 lbs.
December 6, 1906, 1 bag marked W. weighing 277 lbs.
44 January 15, 1907, 1 bag marked T. H. S. weighing 190 lbs.
December 18, 1906, 1 bag marked B. W. weighing 37 lbs.
December 18, 1906, 1 bag marked J. S., or J. C. 45 lbs.

December 18, 1906, 1 bag marked S. K. weighing 271 lbs.
April 9, 1907, 3 bags marked D. weighing 758 lbs.
April 9, 1907, 1 bag marked T. W. weighing 169 lbs.
April 9, 1907, 1 bag marked  weighing 207 lbs.
April 9, 1907, 1 bag marked L. L. weighing 272 lbs.
April 15, 1907, 2 bags marked  weighing 549 lbs.
April 15, 1907, 2 bags marked  weighing 379 lbs.
April 25, 1907, 1 bag marked D. P. weighing 241 lbs.
April 19, 1907, 5 bags marked J. D. weighing 1178 lbs.
April 19, —, 3 bags marked G. W. weighing 624 lbs.
April 19, 1907, 1 bag marked S. K. weighing 186 lbs.

He did not receive 1 bag marked F., nor with a character resembling of the weight of 347 lbs., nor any bag so marked of any weight; nor did he receive 3 bags, two marked J. C. Pope, and one marked J. G., of the total of 902 lbs., or bags so marked of any weight shipped from Uvalde Station, Texas, on November 14, 1906.

He did receive 1 bag marked S. K. of the weight of 271 lbs. shipped October 10, 1906, but did not receive a bag shipped on that date marked S. K. of the weight of 346 lbs.

He received 1 bag marked W., shipped October 23, 1906, from Uvalde, Texas, of the weight of 277 lbs., but did not receive a bag marked W. shipped on that date weighing 109 lbs.

He received a bag marked T. H. S., weighing 190 lbs. shipped October 23, 1906, but did not receive a bag of that mark weighing 193 lbs.

There is not now, nor has there been any other person or persons within the dates mentioned connected with or employed by the Massachusetts Mohair Plush Company except witness author-
45 ized to receive or make a record of mohair received or shipped to that Company. Witness is the only person now, or any time mentioned, empowered by said Company to receive mohair consigned to it. No other person or persons connected with or acting for and in behalf of said Mohair Plush Company has received the same or any portion of the mohair mentioned in his foregoing testimony other than himself, and no person, or persons within his knowledge acting for or in behalf of said Company has received any mohair from Barnes Wallace & Co. within the dates mentioned, other than has been stated by the witness.

There was a market value of the class of mohair received by the witness, per pound, from Barnes & Wallace, at Lowell, Mass. between October 10, 1906 and April 1907, with which value he was acquainted. The value varied according to the grade of mohair consigned.

In October 1906, some grades received sold at 30 cts. per lb., others were of the value of 25 cts. per pound, and some of the market value of 20 cts. per pound, and these were the prices for the same grade at Lowell, Mass. during November and December, 1906. In

March and April, 1907, the market value of the grades of mohair was less than in the fall of 1906. In the months of March and April, 1907, the market value was about 17 cts. on grades shipped by plaintiffs. The average price of the mohair which the witness did receive, as previously stated, from Barnes Wallace & Co., in Lowell, Mass. was on the dates mentioned 24 cts. per pound.

The bag marked W., and the bag marked T. H. S. 26½ cts. per pound. They were sold the 25. of January, 1907, and the prices received were reasonable and was the fair market value of the same.

The witness says he knows nothing about what was done by the Mohair Plush Company respecting the payment of freight charges on the mohair. Mr. Rylah Firth, the cashier of the Company, attends to such matters.

46 Cross-examination:

He is an Englishman and says he was born and raised in England, and came to this country in 1891.

After reaching the age of 21 years he became a wool sorter, working for a firm in England, for whom he continued to work 3 years. He then came to the United States and worked as wool sorter for 5 years for a worsted company and then took employment 12 years ago with his present employer—Massachusetts Mohair Plush Company.

In the fall of 1906, the Massachusetts Mohair Plush Company employed two or three hundred persons. They had one warehouse or place only at which mohair was received. Some mohair was received direct from the railroad on a spur track to the Company's work-; and some loads were brought on trucks, principally by a transportation company that did heavy trucking for most of the corporations.

The mohair received was made into yarn by the Company, and sold, and some of the stock was made into plushes for sale. None of it was resold, but always used in manufacturing by the Company.

The warehouse is within a few feet of the factory, and about 20 yards from the office. Wool and mohair were the only productions received there.

About 90 per cent of the mohair received came in trains, and 10 per cent in drays.

Witness was the only person who did the checking in of the mohair from November 1906 to March 1907. No other person had anything to do with it. When Mohair was delivered from the cars he checked the bags as they were taken from the car, and then again as he weighed them. He inspected each bag and made note of each identification mark on each bag as it came out of the wagon. This he did in person in the ware-house, that being the place where the bags were delivered from the cars or drays. He made a written record of this checking and noted thereon any shortage in the articles or in the weight. The original checking was made on a block of paper and then transferred to his book. This original block
47 or record was thrown away or destroyed after being transferred, and he cannot now produce it.

He checked the mohair from Barnes Wallace & Co. from the let-

ters and bills of lading sent with the goods from the consignor and then returned these papers to the office of the Company. From there they were sent to the Company's office in Boston, Massachusetts, where he supposes they are now in the custody of the Company. His reports made at the time of the checking and the invoice were sent with the reports to the Company's office in Lowell.

He personally inspected and weighed every bag of mohair received by his employer from November 1906 until March 1907.

It is not true that during that time at intervals other persons from time to time checked in the mohair and other things received by his employers at that ware-house and factory. He in person inspected and weighed each and every bag received by them from November 1st 1906, to May 1st, 1907. He inspected and weighed each bag as it came back from the drays or cars during that time, and the inspecting was not done by any other person.

He identified the shipment by the marks or tags thereon and by the information received from the consignors that accompany the goods or applied thereto. He used a block or paper, as before stated, which he cannot now attach for reasons already shown.

His employer received a great quantity of mohair from Texas and other places. About four or five hundred bags per month.

It is true that from time to time his employer received bags of mohair which lacked marks of identification, and which, because of loss of marks and tags could not be applied to any particular invoice. Bags of mohair were received which could not, with absolute certainty be designated as belonging to any particular shipment.

It is not true that at the end of the receiving season there is a number of bags of mohair on hand, the ownership or identity of which was never with certainty located. At the present there are about 10 bags that have not been identified, and they are subject to
48 the order of the railroad tracer. There are times when the bags do not correspond in description with the information given by the consignors, and there has elapsed some time before the identity could be determined by further information obtained from the consignor.

About a half a dozen bags of doubtful identity were received during that season. They are now in the warehouse waiting instructions of the railroad. None of the bags b-ar the marks or correspond with the information given by the consignors. The matter is usually disposed of by the railroad company in its efforts to trace lost or miscarried bags.

There are three or four bags that have been in the warehouse since December 1906. Witness is the only person who identifies the bags at the warehouse, and this is done soon after it is received. There are delays in the receipt of mohair shipped at the same time and place. that is, a part of the goods arrive at one time and a part at another time. It does not occur very often. The extreme limit of time of such delays is 5 or 6 weeks.

The railroads from which said Mohair Plush Company received mohair, are the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad. The switches of the former reach his

employer's warehouse. The latter Company use the same tracks and switch consignments to the Company's warehouse on them.

The Stanley Transportation Company of Lowell carries all stock to his employer's warehouse that did not come by rail. The distance they haul it was about half a mile. (The Stanley Transportation Company is a private trucking Company.)

The floor hands did the trucking of the mohair while witness did the checking. The names of the floor hands are given.

Witness has been engaged in the purchase and sale of mohair in the City of Lowell, Mass. for the Massachusetts Mohair Plush Company since the spring of 1905. He explains the foregoing by this statement: "That he does not buy the mohair but examines the mohair when it is received, and checks it and reports to his employer."

49 There are many grades of mohair, fine, medium, coarse, long, and short, clear and kempy. The wool sorters at his employer's mill make about 14 different grades of mohair. Witness cannot give the commercial name of the different grades and give the difference in value per pound between the several grades.

It is true that the length and fineness of the fiber, as well as dirt, burs and color have much to do with the class and grade of mohair; and it is true that a great many things have to be considered to determine its grade, and no man can grade it without seeing it and giving it a personal examination.

His employer received from Texas points from November, 1906 to April 1907, about 2,000 bags of mohair. From New Mexico about 330 bags. From Arizona about 200 bags and from Turkey about 800 bags.

Witness has refreshed his memory in this matter from his receiving book referred to for the purpose of answering the interrogatories that have been put to the witness, concerning dates, time of shipment, places of shipment, &c. It is in his possession. It is a large book of 480 pages, and it is, therefore, impossible to attach it to his answers, or to attach a copy of it.

Rylah Firth, a witness for plaintiff, testified in substance that he resides at Lowell, Massachusetts, and is the Paymaster for the Massachusetts Mohair Plush Company. He does not know that his said employer received any mohair from Barnes Wallace & Co. between October 10th 1906 and May 1st 1907. The railroad company at Lowell, Mass. presented to his employer an account of freight and advance charges of mohair from Texas, which was assumed to be an account of shipment from Barnes Wallace & Co. of Barksdale, Texas, because of a correspondence in a number of the bags and weight between the shipment from the railroad company and shipping receipts from Barnes Wallace & Co. received from them at about the same time.

Freight on mohair is paid not as the mohair is received, but as called for by the railroad company, on their vouchers or statements as above stated.

50 Witness did not of his own knowledge know anything about the receipt of the mohair in question. That is known to Mr. Hird, who checked the mohair when received. Wit-

ness' respective place is in the office and he has nothing personally to do with the checking of merchandise received.

The freight rate per 100 lbs. on mohair from Uvalde, Texas to New York is $1.45 and from New York to Lowell, 17 cts.

Under the rule prevailing at the factory, freight bills are paid at the end of each week where the goods are delivered or undelivered, as per bills rendered by railroad company with vouchers for same. This was the arrangement with the railroad company. Said freight was paid to the Boston & Maine Railroad Company.

Cross-examination:

During the winter of 1906 and spring of 1907, the Massachusetts Mohair Plush Company employed about 360 people. There was only one place or warehouse at which mohair was received. Some were received from cars and some from drays. The drays were owned by the transfer Companies. Mohair coming in cars was brought within a short distance to the receiving room and then trucked to the receiving room by hand where the bags were weighed and checked. Mohair received by drays was unloaded on the platform and trucked by hand to the receiving room.

His employers were engaged in manufacturing plushes and yarns. The mohair bought was usually for manufacturing in the business of the Company; that is, it was not sold for profit or on commission. The receiving room was a part of the factory.

Cotton yarn was also received for weaving purposes. Witness did not check the mohair. That was done by David Hird who had charge of that work.

All papers used in connection with shipment are sent to the Boston office and there filed. Witness knows nothing about the checking of mohair; that was not a part of his employment. David Hird was employed to do that work.

51 It is true that from October 1, 1906 to May 1st, 1907 large quantities of mohair were received by his employers from Texas and other places. He cannot give, however, the number of bags per month. It is not in the line of his work. David Hird generally attended to the establishment of the identity of the bags of mohair with the several consignments, and witness had nothing to do with it, and knows nothing about when and where this was done and how long after arrival of mohair. It is true that parts of shipments are sometimes delayed, but he cannot give an estimate of the interval intervening between the shipments.

The Boston & Maine Railroad and the New York, New Haven & Hartford are the roads over which his employers receives mohair. The former has track facilities to his employer's warehouse. The latter sometimes run cars to his employer's warehouse over the former's track. When drays are used to deliver mohair, they haul it a distance of half a mile from one freight house, and about a mile and a quarter from the other freight house. The Stanley Transportation Company performs this service.

We hereby agree that the within and foregoing statement is a true and correct statement of all the facts introduced in evidence at the trial of this cause, and that the same, after having the approval of

the court, shall be filed and made a part of the record, and shall be transmitted to the Court of Civil Appeals, as provided by law, and there accepted and acted upon as the statement of facts in this case.

MARTIN, OLD & MARTIN,
Attorneys for Plaintiff.
W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

The foregoing statement of facts having been agreed to by the parties, was this day submitted to me for inspection and approval, and after examination of the same, I find it a true state-
52 ment of all the material evidence in the case, the same is found by me to be correct, and is, therefore, now approved and the Clerk of this Court is hereby ordered to file the same and make it a part of the record of this cause, and to transmit it in its original form under his certificate and seal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, along with the transcript in this case, as provided by law.

This September 25th, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Certificate.

Pending in County Court, Uvalde County, Texas.

No. 462.

L. V. WALLACE
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

I, Zena Dalrymple, Clerk of the County Court in and for Uvalde County, Texas, do hereby certify that the above and foregoing 16 pages is the original statement of facts filed in this cause, and approved by the court and the same which I have been directed to certify to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, along with the record in this cause on appeal.

Given under my hand and seal of office, this 23 day of November, 1908.

[SEAL.] ZENA DALRYMPLE,
County Clerk Uvalde County, Texas.

53 (Endorsed:) No. 4126. L. V. Wallace vs. G., H. & S. A. Ry. Co. Statement of Facts. Filed Sept. 25th, 1908, Zena Dalrymple, Clerk. Filed in the Court of Civil Appeals, at San Antonio, Texas, January 12, 1909, Jos. Murray, Clerk.

Opinion.

No. 4126.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
Appellant,
vs.
L. V. WALLACE, Appellee.

Appeal from Uvalde County.

Suit by L. V. Wallace to recover of appellant $436.20, the value of mohair delivered to appellant for transportation to Lowell, Massachusetts, and which was never delivered. The mohair was shipped from Uvalde, Texas, by appellee and consigned to the Massachusetts Mohair Plush Company. The court sustained a general demurrer to portion of the answer which sought to evade liability on the ground that appellant had restricted its liability to its own line. The cause was tried by jury and resulted in a verdict and judgment for appellee in the sum of $414.92.

By an act of the Congress of the United States of date June 29th, 1906 (U. S. Comp. Stats. Supp. 1907, p. 909) it is provided that no common carrier receiving property from a point in one state to a point in another State can limit its liability to its own line. It is the contention of appellant that the act is unconstitutional in that it takes the carrier's property without compensation and without due process of law, and deprives the carrier of equal protection of the law, and also attacks the sovereignty of the State. All of these points have been duly considered and overruled by this court in case of Railway v. Piper, 115 S. W. 107. In the same decision this court held adversely to the contention that the Federal courts have exclusive
54 jurisdiction of this class of cases. That opinion will be adhered to.

The evidence is sufficient to show that the mohair was not delivered to the consignee.

The judgment is affirmed.

W. S. FLY,
Associate Justice.

(Endorsed:) No. 4126. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. G., H. & S. A. R. R. Co., Appellant, vs. L. V. Wallace, Appellee. From Uvalde County. Opinion by W. S. Fly, Associate Justice. Filed in the Supreme Court, April 24, 1909. F. T. Connerly, Clerk. Filed in the Court of Civil Appeals, at San Antonio, Texas, February 24th, 1909, Jos. Murray, Clerk.

Judgment.

WEDNESDAY, *February* 24, *A. D.*, 1909.

No. 4126.

G., H. & S. A. RY. CO., Appellant,
vs.
L. V. WALLACE, Appellee.

Appeal from County Court, Uvalde County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee L. V. Wallace do have and recover of and from the appellant Galveston, Harrisburg and San Antonio Railway Company and its surety The United States Fidelity & Guaranty Company the amount adjudged by the court below, and all costs in this behalf incurred, and this decision be certified below for observance.

55 *Appellant's Motion for Rehearing.*

In the Court of Civil Appeals, Fourth District of Texas.

No. 4126.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO., Appellant,
vs.
L. V. WALLACE, Appellee.

Appeal from County Court, Uvalde County.

Appellant's Motion for Rehearing.

Now comes appellant and moves the court that the judgment in this cause entered on February 24th, 1909, affirming the judgment of the trial court, be reconsidered, and a rehearing granted appellant herein, for the following reasons:

First Error.

This court erred in overruling appellant's First Assignment of Error, and propositions thereunder, said assignment and propositions readings as follows:

"First Error.

(No. 1 in the Record, Tr. p. 31).

The court erred in overruling defendant's general demurrer, because plaintiff's petition stated no cause of action over which the

court has jurisdiction. On the contrary, the cause of action stated in the petition is one created by the act of Congress of the United States of June 29th, 1906, and one over which the courts of the United States, and the Interstate Commerce Commission alone have jurisdiction.

First Proposition.

The petition stated no cause of action over which the trial court could take jurisdiction. It is based upon, and asserts a right under, the act of Congress of June 29th, 1906, of which the Interstate Commerce Commission and the Circuit and District Courts of the
56 United States alone have jurisdiction. Being without jurisdiction to try the case, the trial court could render no judgment.

Second Proposition.

The petition stated no cause of action against appellant under any other law than that of the act of Congress of June 29th, 1906, and this being unconstitutional, the demurrer should have been sustained."

Second Error.

This court erred in overruling appellant's Second Assignment of Error, and propositions thereunder, said assignment and propositions reading as follows:

"Second Error.

(No. 2 in the Record, p. 31.)

The court erred in sustaining plaintiff's special exception contained in his first supplemental petition, to all that part of defendant's special answer, wherein it is claimed, in substance, that the mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment, whereby defendant contracted only to safely carry the mohair and deliver it to the next connecting carrier after which its liability should cease; and wherein it is further claimed that said contract was in all things strictly complied with, and the mohair, if lost at all, was lost by one of the connecting carriers, and not by defendant.

First Proposition.

It was error to strike out appellant's special answer, because the contract of carriage therein asserted, which limited appellant's duty and liability to its own line, and its own negligence, was a valid defense.

Second Proposition.

The court committed error in following and applying the act of Congress of June 29th, 1906, to the special answer, and in
57 striking it out upon that authority, because in so far as that act attempts to hold the initial carrier liable absolutely for

loss and damage to an interstate shipment occurring upon the line of another and an independent carrier in another State, without fault upon the part of the initial carrier, and in the absence of a voluntary contract to be so bound; and the action of the court, in so applying it, violates the fifth and fourteenth amendments of the Constitution of the United States, because the practical effect is to take appellant's property without due process of law, and without compensation or just cause, and bestow it upon another, and to deprive appellant of the equal protection of the law, and the right to contract, and to acquire and enjoy property as other persons and corporations are permitted to do, without any fault or wrong on its part, or any just cause therefor, and this was fundamental error.

Third Proposition.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas, under Articles 9 and 10 of the Federal Constitution, and is, therefore, void, and it was error for the trial court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense."

Fourth Proposition.

It was error for the court to strike out appellant's special answer and defenses on exception, as shown in this assignment of error, because the answer disclosed a valid and just defense under the law, as administered in this State, and the practical effect of the action of the court, and the rule of law adopted and applied at the trial, is in violation of the Constitution of the State of Texas, Section 19 of Article 1, in that its effect is to deprive appellant of its property, privileges and immunities, without due process of law of the land."

Third Error.

This court erred in overruling appellant's Third Assign-
58 ment of Error, and propositions thereunder, said assignment and propositions reading as follows:

"Third Error.

(No. 4 in the Record, Tr., p. 32).

The Court erred in the second paragraph of the main charge, which reads as follows:

'You are further instructed by the court that if you believe from a preponderance of the evidence in this case, that the plaintiff L. V. Wallace is the successor of the firm of Barnes, Wallace & Co., and as such successor, if you find he is such successor, is the owner of the assets of said late firm, and particularly of the claim, if any, involved in this suit; and if you further believe from a preponderance of the

evidence in this case that said Barnes, Wallace & Co., on October 10th, 1906, and October 23rd, 1906, and November 14th, 1906, delivered the mohair alleged by plaintiff to have been so delivered on said respective dates, and further find that said mohair, if any, was received by the defendant, at Uvalde, Texas, and shipped and billed by defendant from Uvalde, Texas, to the Massachusetts Mohair Plush Co. at Lowell, Mass.; and if you further find that all or any part of such mohair, if any, never reached Lowell, Mass., or was never delivered to said Massachusetts Mohair Plush Co., then, if you so find, you will find for the plaintiff.'

First Proposition.

One of the vices of this charge is, that it makes appellant liable absolutely for the safe delivery of the mohair at destination, unless the same was lost by the act of God or the public enemy, whereas, there were neither pleadings nor proof showing a contract to carry to destination, but, on the contrary, it was undisputed that the contract expressly stipulated that appellant's duty and liability as a carrier should cease at the end of its own line, and when it had delivered the mohair to its next connecting carrier, the shipment being an interstate shipment.

59 Second Proposition.

The rule of law applied and given by the court in this charge is that of the act of Congress of June 29th, 1906, the practical effect of which—and of the theory and action of the court in enforcing same against appellant—is to deprive appellant of its property without due process of law, and to arbitrarily take its property for no just cause or fault, and bestow it upon another without compensation to appellant, and to deprive it of the right and privilege to acquire, use and enjoy property, make just and reasonable contracts in the prosecution of its business, and for the preservation of its property and rights, as other persons and corporations may do, and the said law, and the action of the court is, therefore, in violation of the fifth amendment to the Constitution of the United States, and of Section 19, Article 1, of the Constitution of the State of Texas.

Third Proposition.

The practical effect of this law, and the action of the court in applying it, is to deny appellant the equal protection of the law in making contracts, in acquiring and enjoying the use of property, and in the exercise of immunities, and privileges such as other *other* carriers, persons and corporations may, and is therefore in violation of the purpose and spirit of the fourteenth amendment to the Constitution of the United States, as well as the bill of rights of the Constitution of Texas.

Fourth Proposition.

The act of Congress of June 29th, 1906, upon which this cause of action is based, and which was adopted by the Court and given to

the jury in this charge, is an invasion of the reserved rights and the legislative prerogative of the State of Texas, and violates Articles 9 and 10 of the Federal Constitution."

Fourth Error.

The court erred in overruling appellants's Fourth Assignment of Error, and propositions thereunder, said assignment
60 and propositions reading as follows:

"Fourth Error.

(No. 5 in the Record, Tr., pp. 32-33.)

The court erred in the first paragraph of the main charge, which reads as follows: 'You are instructed by the court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and as such common carrier is liable to any person who delivers freight to it, or its duly authorized agents, for transportation from a point in one State to a point in the same, or any other State, of this Union, said freight being received by said defendant at the one point, and billed by it to the other point, for any damage or loss accruing to said freight, after such receipt, and before delivery to the consignee, at point of destination, provided said damage was not caused by some act of God, or at the hands of a public enemy.'

First Proposition.

One of the vices of this charge is, that it makes appellant liable absolutely for the safe delivery of the mohair at destination, as though there was an express contract to be so bound, without exceptions or limitations, whereas, in fact, there was no such contract asserted or shown, but, on the contrary, the contract actually entered into limited all duty and liability as a carrier to appellant's own line.

Second Proposition.

The rule of law followed and applied in this charge is that of the act of Congress of June, 1906, which law, and the act of the court in so enforcing and applying it, is violative of the fifth amendment of the Constitution of the United States, and Sec. 19, Art. 1, of the Constitution of Texas, because the practical effect of it is to take the property of appellant without just cause or compensation, and without due process of law, and bestow it upon another, against whom appellant has committed no wrong or breach of contract.

61 Third Proposition.

The practical effect of this law, and the action of the court in applying it, is to deny appellant the equal protection of the law in making contracts, in acquiring and enjoying the use of property, and in the exercise of privileges and immunities such as other carriers,

persons and corporations may, and it is therefore in violation of the purpose and spirit of the fourteenth amendment to the Constitution of the United States, as well as the bill of rights of the Constitution of Texas.

Fourth Proposition.

The act of Congress of June 29th, 1906, upon which this cause of action is based, and which was adopted and given to the jury in charge by the court, is an invasion of the reserved rights and the special legislative prerogative of the State of Texas, and violates Articles 9 and 10, of the Federal Constitution."

Fifth Error.

This court erred in overruling appellant's Fifth Assignment of Error, and propositions thereunder, said assignment and propositions reading as follows:

"Fifth Error.

(No. 3 in the Record, Tr., pp. 31-32.)

The court erred in excluding from the jury, when offered in evidence by defendant, certain stipulations and parts of the bill of lading, which read as follows:

"It is understood and expressly stipulated that the liability of the Galveston, Harrisburg & San Antonio Railway Company shall cease upon delivery to its next connecting line of the goods, merchandise and produce mentioned herein.

'Neither this Company nor any of its connections or transfer lines which receive and transport said property will be responsible for damages (for certain causes not offered), or for any cause whatever not due to the company's negligence.'

62 All of which more fully appears in bill of exception No. 2, which is made a part hereof.

First Proposition.

This contract was in all respects lawful and reasonable, and, when supported by proof that it controlled the shipment and the parties, and was complied with fully, constituted a complete defense to the cause of action—assuming that the act of Congress did not, for any reason, apply—and it was error for the court to exclude it.

Second Proposition.

In striking out this evidence, and in following and applying the act of Congress of June 29th, 1906, the court erred because the act referred to, and the action of the court in so applying it, are in violation of the fifth and fourteenth amendments to the Federal Constitution and of Sec. 19, Art. 1, of the Constitution of Texas, in that the effect of it all is to take appellant's property without due process of law, and to deny it the equal protection of the law."

Sixth Error.

This court erred in overruling appellant's Sixth Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Sixth Error.

(No. 6 in the Record, Tr., p. 33.)

The court erred in refusing defendant a new trial on its motion, because the verdict and judgment are wholly without facts to support them, and are contrary to law and against the overwhelming weight of the facts, in that plaintiff wholly failed to show that the mohair in question was lost or damaged, and was not delivered at destination. In fact, it appeared from the undisputed facts that the consignees have still in their possession, and have had for many months, a number of unclaimed sacks of mohair, exceeding the number
63 and amount claimed by plaintiff to have been lost, which mohair consignees are unable to identify, because the marks have been lost and defaced, and which mohair is now being held for identification by the consignees, and plaintiff's mohair is no doubt in the lot.

Proposition.

Appellee wholly failed to show that the consignee did not receive the mohair, or that appellant is liable therefor. On the contrary, the overwhelming weight of the facts shows that the mohair was delivered at destination, and from loss of marks and from mixing up the bags and misapplying them, the consignees have produced the confusion, and actually now have the mohair on hand, if in fact any was not credited to appellee, and it was, therefore, error to overrule the motion for a new trial."

Appellant shows to the Court, that appellee L. V. Wallace, and his attorney- of record, Martin, Old & Martin, all reside in Uvalde County, Texas, where service of this motion may be had upon them.

We now, in conclusion, respectfully submit that, for the reasons hereinbefore shown and set out in appellant's brief, that this cause ought to be reconsidered and ordered reversed and dismissed, and appellant so prays that such be the order of the court; or, in the event appellant is not entitled to have the cause reversed and dismissed, because of lack of jurisdiction of trial court, then it prays that the cause be reconsidered, reversed and rendered, or at least be reversed and remanded.

BAKER, BOTTS, PARKER & GARWOOD,
W. B. TEAGARDEN, &
G. B. FENLEY,
Attorneys for Appellant, G., H. & S. A. Ry. Co.

(Endorsed:) No. 4126. Galveston, Harrisburg & San Antonio Ry. Co., Appellant vs. L. V. Wallace, Appellee. In the Court of Civil Appeals 4th District of Texas. Motion for rehearing by appel-

lant. Filed in the Court of Civil Appeals, at San Antonio, Texas, March 10, 1909. Jos. Murray, Clerk. Filed in Supreme Court, Apr. 24, 1909, F. T. Connerly, Clerk.

64 *Order Overruling Motion for Rehearing.*

WEDNESDAY, *March 24th, A. D.* 1909.

No. 4126.

G., H. & S. A. RY. Co., Appellant,
vs.
L. V. WALLACE, Appellee.

Appeal from Uvalde.

The motion of appellant for a rehearing filed March 10th, 1909, coming on to be heard, and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled; it is further ordered that appellant Galveston, Harrisburg and San Antonio Railway Company and its surety The United States Fidelity & Guaranty Company pay all costs of this motion.

65 In the Supreme Court of Texas.

No. —.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
Plaintiff in Error,
versus
L. V. WALLACE, Defendant in Error.

Petition for Writ of Error to the Fourth Supreme Judicial District of Texas.

To the Honorable the Supreme Court of Texas:

Your petitioner, the Galveston, Harrisburg & San Antonio Railway Co., respectively represents that in a certain cause, pending on appeal in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, to wit, No. 4126, Galveston, Harrisburg & San Antonio Railway Co., Appellant, versus L. V. Wallace, Appellee, on appeal from the County Court of Uvalde County, Texas. The judgment of the trial court from which your petitioner appealed, was, on February 24th, 1908, in all things affirmed by said Court of Civil Appeals, in which action and proceedings said Court of Civil Appeals committed manifest errors, to the prejudice of your petitioner and it now hereby applies to this Honorable Court for a writ of error to said Court of Civil Appeals, to the end that said cause may be brought here for revision, and for grounds to sustain this petition respectfully shows to the court:

L. V. Wallace, defendant in error, and Messrs. Martin, Old & Martin, his attorneys of record, all reside in Uvalde County, Texas.

For the purpose of convenience the parties will be referred to as appellant and appellee, as they stood in the Court of Civil Appeals.

66 *Statement of the Case.*

For want of sufficient statement in the opinion of the Court of Civil Appeals, we will be compelled to submit here a complete statement of the issues involved, and the disposition of them.

Appellee, the plaintiff below, filed this suit in the County Court of Uvalde County, Texas, to recover of appellant the sum of $436.20, the alleged value of certain mohair delivered to appellant at Uvalde, Texas, for shipment to Lowell, Massachusetts, to the Massachusetts Mohair Plush Company, and which was lost and never delivered to the consignees. (Petition, Tr., pp. 2, 3 and 4.)

Appellant demurred generally and excepted specially to the petition. Both the general demurrer and the special exception were overruled, and exceptions saved. (See appellant's answer, Tr., pp. 4 and 5, and the order overruling the general and special exceptions, Tr., p. 8.)

Appellant, by way of answer, interposed a general denial, and a special answer to the effect that the mohair was accepted and carried upon a contract duly entered into, wherein it was expressly stipulated that appellant's liability should cease upon delivery to its next connecting line, and that it should not be held liable for any loss or damage not due to its own negligence; which contract it complied with by delivering same to its next connecting carrier in good order at Galveston, Texas, and it was thereby absolved from liability. Appellant further asserted that the act of Congress of June 29th, 1906, upon which appellee based his cause of action, is in violation of the State and Federal Constitution, because:

(1) The effect of its operation is to take appellant's property without compensation, and without due process of law, and bestow it upon another, without any violation of contract, default
67 or wrong on appellant's part.

(2) It deprives appellant of the equal protection of the law, in that it denies it the right of contract and to have and enjoy the benefits of its contracts, and acquire, hold and enjoy its property as other persons and corporations may do.

(3) It is an invasion of the special legislative prerogative of the State legislature, showing how and why this is true. (See the special answer, Tr., pp. 5, 6 and 7.)

To this special answer appellee urged a general demurrer and a special exception, based upon the sole ground that because of the application of the act of Congress effective August 1906 (act of June 29th, 1906), appellant was liable absolutely for the safe delivery of the mohair at destination, upon the mere fact that it received and receipted for the mohair, and could not, by any kind of a contract, relieve itself of that liability, and, therefore, the special answer, stated no defense. (Tr. pp. 7 and 8.)

The court sustained both the general and special exceptions, and struck out appellant's entire answer, except the general denial, to which exception was served. (Tr. p. 8.)

The cause of action was, by appellee and the court, construed to be one under the act of Congress of June 29th, 1906, as will appear from appellee's exceptions to the answer, and the action of the court thereon above referred to, and by the exclusion of those stipulations in the bill of lading, when offered in evidence, limiting appellant's duty and liability as a carrier to its own line. (See bills of exception Nos. 1 and 2, Tr., pp. 26 and 27.) And from the charge of the court, paragraph Nos. 1 and 2 (Tr. pp. 21 and 22), wherein said act of Congress is followed and given to the jury as the law of the case.

The trial was by the court and a jury, resulting in a ver-
68 dict and judgment for appellee for the sum of $414.92. (Tr. p. 23.)

First Error.

The Court of Civil Appeals erred in overruling appellant's first assignment of error, and propositions thereunder, said assignment and propositions reading as follows:

First Error.

(No. 1 in the Record, Tr. p. 31.)

The Court erred in overruling defendant's general demurrer, because plaintiff's petition stated no cause of action over which the court has jurisdiction. On the contrary, the cause of action stated in the petition is one created by the act of Congress of the United States of June 29th, 1906, and one over which the courts of the United States and the Interstate Commerce Commission alone have jurisdiction.

Proposition.

The petition stated no cause of action over which the trial court could take jurisdiction. It is based upon, and asserts a right under, the act of Congress of June 29th, 1908, of which the Interstate Commerce Commission and the Circuit and District Courts of the United States alone have jurisdiction. Being without jurisdiction to try the case, the trial court could render no judgment.

Statement.

The portions of the petition stating the cause of action and liability read as follows: "For a cause of action the plaintiff represents that the defendant is a common carrier, and on the dates hereinafter stated, for and in consideration of the legal and proper charges to be paid, and which were duly paid to the delivering carrier, received from the firm of Barnes, Wallace & Co., for delivery to the Massachusetts Mohair Plush Company, at Lowell, Mass.," etc. "Fourth. That said defendant then and there, at the time of receiving said

mohair from said firm, did issue, execute and deliver to
69 the said firm bills of lading of dates, viz. October 10th, 1906, October 23rd, 1906, and November 14th, 1906, which said bills of lading will be introduced in evidence, or copies thereof, at the trial of this case, with description of said mohair by bag and mark on said bag, and weight of said bag or bags, and stating that the same were received by said defendant for delivery to the said Massachusetts Mohair Plush Co., at Lowell, Mass., which mohair was, at the dates hereinafter stated, then and there delivered to the said defendant, at Uvalde Station, in perfect good order and condition, upon the agreement and contract with the said defendant that it was to be delivered in like order and condition to the said Massachusetts Mohair Plush Company, at Lowell, Mass."

Plaintiff's first supplemental petition reads as follows:

"Now comes the plaintiff, and files this, his first supplemental petition, excepting to, and in answer to, defendant's original answer in this case, and says:

"That he excepts generally to said answer, and says it shows no defense, and prays the judgment of the court.

"MARTIN, OLD & MARTIN,
"Attorneys for Plaintiff."

"And excepting specially, the plaintiff says said answer is insufficient, in this, that the defendant pleads and sets up that under a contract with the plaintiff it limited its liability to its own line, and that it delivered to its next succeeding carrier said mohair, and prays judgment. The Plaintiff excepts to said defense as set up, on the ground that it is no defense under the law—the act of Congress, called the railroad rate bill, which became a law in August, 1906, under which each receiving carrier is liable for freight lost, and may recover from his connective carrier, or the carrier who lost the goods—and prays this exception be sustained."

The general demurrer of appellant was submitted and overruled. (Tr. p. 8.)

The Court construed it to be a suit under the Federal law of 1906, and so charged the jury. See first and second paragraphs of the charge. (Tr. pp. 21 and 22.)

The court sustained general and special exception to appellant's answer (Tr. p. 8), and excluded every part of the contract of shipment limiting appellant's duty and liability to its own line.
70 (See bills of exception Nos. 1 and 2, Tr., pp. 26 and 27.)

And these rulings of the court were expressly based upon the act of Congress in question.

The question of jurisdiction of the trial court over the subject matter of the controversy was presented in the Court of Civil Appeals. See appellant's brief, pages 4 to 17, and the opinion of the court.

Authorities.

That the general rule governing jurisdiction fixed by the act of August 13, 1888 (U. S. Com. Stat. 1901, p. 508), does not control

in this case, because Section 9 of the act of 1887 is special in its effect, and controls in this case, see—

In re Horst, 150 U. S., 653; 27 L. ed., 1211; 14 Sup. Ct. Rep., 221.
U. S v. Mooney, 116 U. S., 107; 29 L. Ed., 552.
Price v. Abbott, 17 Fed. Rep., 506.
Howard Supply Co. v. Ry. 162 Fed. R., 188.
Parsons v. Ry., 167 U. S., 455; 17 Sup. Ct. R., 887.
Art. 3, sec. 2, Federal Constitution.

That the Circuit and District Courts of the United States and the Interstate Commerce Commission alone have jurisdiction over all causes of action arising under the act of Congress of 1887, and all its amendments, including the act of June 29, 1906, see—

Van Patten v. Ry., 74 Fed., 981.
G. C. & S. F. Ry. Co. v. Moore, 98 Tex., 302; 83 S. W., 362, and cases cited.
Copp v. Ry. 43 La. Ann., 513; 26 Am. St. R., 199; 12 L. R. A., 726.
Abilene Cot. Oil Co. v. T. & P. Ry. Co., U. S., (1907); 27 Sup. Ct. Rep., 350, reversing the Texas Court of Civil Appeals in the same case, reported in the 85 S. W., 1052.
24 St. L., 382, Sec. 9, Fed. St. Ann., Vol. 3, p. 833, and cases
71 cited.

Special attention is invited to the recent case of Pittsburg, C. C. & St. L. Ry. Co. v. Wood, 84 N. E., 1009 (Indiana App., 1908).

Special attention is also invited to Daish's Procedure in Interstate Commerce Cases (1909), Section 158, and cases cited.

When Congress creates a new right and provides a remedy in the Federal Courts, without mention of the State courts, jurisdiction will be exclusive in the Federal Courts.

Sheldon v. Ry., 105 Fed. R., 785.
Copp v. Ry., supra.

Prior to the passage of the act of 1906, there was no rule of law existing in Texas, or elsewhere, upon which appellee could have recovered against appellant in this case, in the face of the contract of shipment asserted in the answer.

McCarn v. Ry., 84 Tex., 352.
Moore on Carriers, pp. 457 and 458, Sec. 8, and cases cited.

The parties and the trial court having construed the cause of action stated in the pleadings to be one based upon the act of Congress of June 29, 1906, this court is bound by that construction, if there is in fact room for doubt about it.

Blum v. Withers, 66 Tex., 350.
Ry. v. Ramey, 23 S. W. (Tex. C. A.), 442.
Ry. v. Kenedy, 9 Tex. C. A., 232.
Bronson v. Studebaker, 133 Ind., 147.
Tully v. Tranor, 53 Cal., 274.
Harwood v. Toms, 130 Mo., 225; S. W.
Drury v. Newman, 99 Mass., 256.
Lockwood v. Quackenbush, 83 N. Y., 607.
Dungan v. Reed, 167 Pa. St., 394.

Remarks.

In view of the opinion of the Court of Civil Appeals, we deem it important to first discuss whether or not this suit is based upon the act of June 29, 1906. Passing for the present the question
72 of jurisdiction of the court, we submit that had his suit been filed prior to August, 1906, and had the cause of action been stated in the language of his petition, appellant's special answer would have been a good defense to it.

There was, prior to that act, no common law or statutory rule, State or Federal, whereby he could have recovered from appellant for loss or damage to his property occurring upon the line of an independent connecting carrier, in the absence of a contract by appellant to become liable, as at common law, for the safe delivery of the property at destination. Such was the condition of the law prior to August, 1906, and this is so well settled that the proposition needs only to be stated.

At the trial, appellee insisted that his right to recover rested upon the act of Congress of June 29th, 1906, and the court took that view of it, and applied that law. All parties acted upon that theory of the case, and the trial, from beginning to end, was conducted upon that theory. If anything remained that was necessary to be shown to determine this matter without doubt from the face of the pleadings, this was supplied by appellee in his supplemental petition, wherein he expressly declares upon the act of 1906. But, if doubt still remained, this is now entirely removed by the construction placed upon the pleadings by appellee himself and the court, and this is now binding upon this court.

Blum v. Withers, supra, and other cases cited.

There is a marked distinction between the case at bar and the case of G. H. & S. A. Ry. Co. v. Piper, 115 S. W., 107, in which this court denied the writ of error. In the Piper case the Court of Civil Appeals held, if we correctly understand the opinion, that the cause of action was not based upon the act of Congress of June 29th, 1906, but that the act was invoked only to
73 fix liability, holding also that the trial court had jurisdiction, in neither of which views do we concur. But, in view of the fact that the contract of carriage was alleged to have been one to carry to and deliver at destination, without exception or limitation, and the contract offered in evidence, as found by the court, fully sustained this allegation, the affirmance of the case might well have been placed upon the ground that plaintiff alleged and proved by the undisputed facts that defendant contracted to carry and deliver the property at destination, without limiting its liability, and the judgment rendered in the trial court was the only one possible under the facts—hence the errors of the trial court, in excluding the defenses, which were demonstrated to have been unfounded in fact, were not reversible errors; and we may reasonably assume that this view of that case caused this court to deny the writ of error therein.

The case at bar, as is elsewhere shown, without doubt is based upon a contract to carry only to the end of the line of plaintiff in

error, and to deliver to a connecting carrier after which all liability on its part should cease, and by reference to the excluded evidence, as shown by bills of exception referred to in the statement, ample testimony was offered to show that the contract was fully complied with.

If this suit is not based upon the Federal statute, as the Court of Civil Appeals in their opinion seem to have held then appellant is peculiarly unfortunate, for the case was tried upon that theory, and for that reason only it was that the trial court excluded appellant's defenses based upon its contract limiting the carriage and its liability to its own line. It was conceded by the exception that the contract alleged by appellant was executed, and upon making proof of the execution of that contract and compliance therewith, as it alleged, appellant would have been entitled to an instructed verdict, had the case not been based upon the Federal statute. It is clear,
74 from the action of the court, that such would have been the result.

In view of the language of appellee's supplemental pleading, and the action of the trial court, it would seem to be unnecessary to discuss this proposition further.

We come next to consider our contention that the cause of action asserted is one of which the State courts have no jurisdiction.

Attention of the court is invited to the fact that causes arising under the interstate commerce law of 1887, and its amendments, are not controlled by the Federal statute, Art. — (U. S. Comp. St. 1901, p. 508), governing jurisdiction of courts generally, because Section 9 of the former law is special in its nature, and expressly takes the cases out of the general rule. In all such cases the act which specially designated the courts in which cases shall be tried will control. In re Horst, 150 U. S., 653, and other cases cited on p. — of this brief.

Article 3, Section 2, of the Federal Constitution, is a mandatory order to Congress to provide a Federal tribunal for "all cases" arising under the Constitution and laws of the United States, and the treaties entered into by them.

Martin v. Hunter, 1 Wheaton, 328; 4 L. Ed., 103.

Within the meaning of this article the words, "suits," "cause" and "action" are held to be convertible terms.

Cohens v. Virginia, 6 Wheat., 264; 5 L. Ed., 257.

In re Metzger, 17 Fed. Cases, 234.

It seems to be the settled rule of law that when Congress creates a new right, and provides for its enforcement in the Federal courts, without also conferring jurisdiction on the state courts, such remedy is exclusive, and the State courts are without jurisdiction.

Sheldon v. Ry., 105 Fed. R., 785.

75 Copp v. Ry., supra.

At the very inception of interstate commerce legislation it was thought by Congress to be more expedient to require all causes of action arising under that legislation that is, the new rights created

thereby—to be litigated in Federal tribunals, where uniformity and harmony of interpretation and application could be had. They could readily foresee the necessity of such an arrangement respecting all traffic and rate questions. In fact, it has been held that as to a rate issue, whether based upon the common law or the Federal statute, the Federal jurisdiction is necessarily exclusive, and this would be true were it not so provided by the law, and notwithstanding the fact that the common law afforded a similar remedy that had been enforcible in the State courts prior to the amendment giving the Interstate Commerce Commission power to establish rates and notwithstanding the provisions of Section 22, saving to shippers all rights pre-existing under the common law or the statutes of the several States. A conflict of decisions and jurisdiction between the State and Federal courts could not otherwise have been prevented. These propositions are clearly recognized in the cases previously cited in this brief, in the following cases:

> Abilene Cotton Oil Co. v. T. & P. Ry. Co., U. S. Sup. Ct. (1907), 27 Sup. Ct. R., 350, reversing the Texas Court of Civil Appeals in the same, 85 S. W., 1052.

This rule has, so far as we are aware, been applied with uniformity by the courts to the interstate commerce act of 1887, and all its amendments. We see no reason why the rule should be departed from now, with respect to the new cause of action added to the original legislation by the amendment of 1906. It is just as much a part of the original law as is Section 8, which created the bulk of the remedies available to the shipper prior to 1906. Had
76 Congress not intended for the new right of action to be enforced in the same manner as the rights created under Section 8, the new remedies would not have been incorporated in that law as an amendment, or else a provision would have been incorporated giving the State and Federal courts concurrent jurisdiction.

The conclusion is irresistible that the act of 1887 and all its amendments, including the act of 1906, must now be regarded as one act of legislation, and one legal plan, and the remedy provided in Section 9 applied as well to the act of 1906 as it does to Section 8, or any other provision of the law.

The language of Section 9 is too plain and unambiguous to require resort to rules of construction. It is couched in language not one word of which can be misunderstood. That portion which is of interest here reads as follows:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of such remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." See also Section 2 of the Elkins act, where the same purpose is manifested.

The act of 1906 made many radical changes in the body of the interstate commerce law. Much legal learning and time and pains were devoted to the task of reforming and reconstructing the law. It must therefore follow, as a matter of common sense, as well as an irrebut-able legal conclusion, that Congress deliberately intended what the language declares, giving to it the commonly accepted meaning.

In the first section of the amendment the question of jurisdiction of certain offenses under the act of 1903 is referred to and provided
77 for, and a new right is created in favor of a shipper whose business requires switching and trackage facilities; also providing the means of enforcement, and for heavy penalties.

Attention of the court is also invited to Section 5 of the act of 1906, amending and entirely reconstructing Section 16 of the act of 1887. This amendment provides for the enforcement of awards by the Commission for damages done to shippers, and also affixes heavy penalties, and provides for injunction in certain cases by the carrier against the Commission. Attention is also invited to Section 7 of the act of 1906, entirely reconstructiong Section 20 of the act of 1887, and giving the right of action here asserted by appellee. In short, it is apparent from the amendment, and reconstructed law, that it was the deliberate purpose of Congress to create an entire legal plan and to give to the Federal courts exclusive jurisdiction over all the rights therein created, as well as the penal features of the law.

It is inconceivable that Section 9 would have been allowed to remain intact while so many other sections were emasculated and reconstructed, and so many new rights created, had Congress not intended to confer exclusive jurisdiction upon the Federal courts of all cases arising thereunder.

All the new provisions creating rights, imposing penalties, and providing procedure, harmonize entirely with this theory, and constitute one harmonious plan. Such in our judgment, is the effect of the decision of our Supreme Court in Ry. v. Moore, 98 Tex., 302, 83 S. W., 362, and this theory is sustained by all the cases in point. Special attention is invited to the recent case of Howard Supply Co. v. Ry., 162 Fed. R., 188, where the act of 1906 is considered also.

If the authorities cited hold, as we insist they do, that prior to the act of 1906 exclusive jurisdiction of the Federal courts over all
78 new rights created by the act of 1887, and all its amendments, including the Elkins law of 1903—and by new rights we mean rights not theretofore existing at common law or by State statutes—were enforcible only by the Interstate Commerce Commission and the Federal courts, then it would seem to follow, as a necessary result, that the same rule must apply to the act of 1906.

It must here be borne in mind that the act of 1887 created but few new rights available to the shipper in the form of recoverable damages, but from time to time others have been added, including the act of 1903, and yet Section 9 has remained intact, as before stated; meanwhile it has uniformly received the application by the Commission and the Federal courts for which we contend.

If it is now necessary or proper to give the law a new interpretation, and say that as to the right of action given in the act of 1906, the State and Federal courts have concurrent jurisdiction, the reason to justify this course must be found in the language of the new amendment. That is to say, it should somewhere appear therein that the new cause of action is not subject to the procedure and jurisdiction provided for the enforcement of all other provisions of the law. If the new act is silent on this subject, then, like the provisions of the Elkins act, upon being incorporated in the body of the chapter, it cannot be excepted from the provisions in question, except by judicial legislation; and, assuming plaintiff's cause of action to be founded upon the act of 1906, and that it is a right of action not theretofore existing then it necessarily follows that the County Court of Uvalde County was entirely without jurisdiction to try this controversy, and the opinion of the Court of Civil Appeals is in conflict with the case of Ry. v. Moore, supra, and all other cases cited.

As we understand the opinion of the Court of Civil Appeals, in G. H. & S. A. Ry. Co. v. Piper, 115 S. W., 107, they hold that
79 it was the intention of Congress in Section 9 of the act of 1887, to confer exclusive jurisdiction on the Commission and the Federal courts only for infractions of the act that is, for some disobedience of that law as it then stood. Section 8 of that act, as we have shown, contained the bulk of the rights and penalties created, but the fact has evidently been overlooked that, as often as new penalties and rights have been by amendment incorporated in that law, it has been held that Section 9 controlled the enforcement of them. Section 9 sustains an important part in a harmonious plan or scheme for the government of interstate commerce, and it would seriously disturb the plan to now say that Section 9 applies only to the rights and penalties provided in the original act, previous to being amended.

Such a construction of the law cannot be correct.

It would leave us in a peculiarly unfortunate situation.

In the act of 1906, rate-making power was given the Commission. Applying this rule to complaints against carriers for charging unreasonable rates, we would probably soon find a conflict of decisions on this complicated question of rates. A State court would probably hold a rate unreasonable which the Federal courts would hold just and fair. Other conflicts and complications would undoubtedly arise out of an attempt at a dual administration of that and other regulations of interstate commerce.

If Section 9 applies only to a part of the rights and remedies, then how are we to determine what cases we may file in the Federal courts, or before the Commission, and what cases we may file in the State courts?

If such a course was intended by Congress, it is very unfortunate that, in reforming the law in 1906 by the amendment in question, they did not make some expression of that purpose in the act, and give a classification of the causes of which the Federal courts should have exclusive jurisdiction.

80 A few plain words could have been employed for that purpose; just a sentence would have sufficed. It would not help

the situation to say, if such a thing were permissible, that this matter was overlooked. This subject must have been in the mind of each member who took interest in the law. It could not have escaped his attention.

In the late work just published by Mr. John B. Daish, in Section 158, where this question is fully discussed, we find the following statement:

"A careful consideration of the present law and the decisions thereunder leads to the conclusion that if a plaintiff or complainant seeks to enforce a right where the subject matter is interstate commerce, and where the right is one which has not been either reiterated, modified or denied by the act to regulate commerce, the State and Federal courts have concurrent jurisdiction of the case, subject, of course, to the jurisdiction of the parties. If, however, one desires to enforce a right found within the act to regulate commerce, jurisdiction to hear and determine the matter is exclusive in the Federal courts, except in a proceeding brought under Sections 8 and 9 for damages, in which event the Interstate Commerce Commission has concurrent jurisdiction."

It needs only to be stated, in conclusion, that if the County Court was without jurisdiction, the Court of Civil Appeals had no authority to enter any judgment except one annulling the illegal judgment and dismissing the case, with judgment for costs.

Wadsworth v. Chick, 55 Tex., 24.
Temmons v. Bonner, 58 Tex., 562.
Roy v. Whitaker, 50 S. W., 498.
McMahan v. City Bank, 61 S. W., 953.

In presenting this case in the Court of Civil Appeals out of an abundance of caution, appellant's criticisms of the action of the trial court and the act of Congress upon which the suit is based
81 were submitted in several separate assignments and propositions, all being similar, however, in legal effect. The real substance of the criticisms raised in all said assignments is, that the act violates the Fifth and Fourteenth Amendments to the Federal Constitution, and Section 19, Article 1, of the State Constitution, because in effect it arbitrarily and without just cause takes the property of the initial carrier to pay the shipper for loss and damage due to the wrong of a stranger, which is not due process of law, and which denies defendant in such cases the equal protection of the law.

It is also contended that, under guise of regulating interstate commerce, the act invades the reserved rights and legislative prerogative of the several States, and therefore violates Articles 9 and 10 of the Federal Constitution.

Your petitioner now contends that the Court of Civil Appeals committed error in refusing to sustain the several assignments of error presenting objections to the act of Congress as above indicated, and for the purpose of facilitating the labors of the court, so many of the assignments of error as are deemed necessary will be here submitted in a group, with appropriate statements and authorities, concluding with a discussion of the propositions and authorities, under appropriate head lines.

Second Error.

The Court of Civil Appeals erred in overruling appellant's second assignment of error, and propositions thereunder, said assignment and propositions reading as follows:

Second Error.

(No. 2 in the Record, p. 31.)

The court erred in sustaining plaintiff's special exception, contained in his first supplemental petition, to all that part of defendant's special answer wherein it is claimed, in substance, that the mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment,
82 whereby defendant contracted only to safely carry the mohair and deliver it to the next connecting carrier, after which its liability should cease; and wherein it is further claimed that said contract was in all respects strictly complied with, and the mohair, if lost at all, was lost by one of the connecting carriers, and not by defendant.

First Proposition.

It was error to strike out appellant's special answer because the contract of carriage therein asserted, which limited appellant's duty and liability to its own line, and its own negligence, was a valid defense.

Statement.

The special answer is lengthy, and would unnecessarily encumber the brief, but it asserts, in substance and legal effect, that the mohair was accepted and transported under a written contract, duly executed, whereby appellant's duty as a carrier was confined to its own line and it was thereby released from liability for loss or damage not occurring on its own line, and not due to its own negligence. (Tr. p. 5.) It also asserts that the act of Congress of June 29th, 1906, upon which appellant's cause of action is based, is void, because it violates the State and Federal Constitutions, in that its practical effect is:

(1.) To deprive appellant of its property without due process of law, and without compensation, and without violation of contract or wrong on its part.

(2.) To deprive appellant of the equal protection of the law, and to deny it the right to contract and to acquire and enjoy property and the benefits of its contracts as other persons and corporations may do.

(3.) It invades the exclusive legislative prerogative of the State, and the particulars, showing how this result is produced, are set out at length. (See this portion of the answer, Tr., pp. 6 and 7.)
83 This answer was demurred to generally by appellee in a supplemental petition (Tr. p. 7), and he also urged a special exception to the entire special answer, charging that, because of the

act of Congress of 1906, it stated no cause of action. (Tr. pp. 7 and 8.)

For more complete statement of these pleadings, and the rulings of the court thereon, see the preliminary statement on the first pages of this brief.

The court sustained the exceptions, and struck out the entire special answer. (Tr. p. 8.)

Authorities.

Ry. v. Jackson & Edwards, 89 S. W., 968.
McCarn v. Ry., 84 Tex., 352.
Demmitt v. Ry., 15 S. W., 761 (Mo.)
2 Parsons on Cont., 7th Ed., 227.
Moore on Carriers, pp. 459-462.

Discussion of this proposition will be included in remarks submitted under the next proposition.

Second Proposition.

The court committed error in following and applying the act of Congress of June 29th, 1906, to the special answer, and in striking it out upon that authority, because in so far as that act attempts to hold the initial carrier liable absolutely for loss and damage to an interstate shipment occurring upon the line of another and an independent carrier in another State, without fault upon the part of the initial carrier, and in the absence of a voluntary contract to be so bound; and the action of the court, in so applying it, violates the Fifth and Fourteenth Amendments of the Constitution of the United States, because the practical effect is to take appellant's property without due process of law, and without compensation or just cause, and bestow it upon another, and to deprive appellant of the equal protection of the law, and the right to contract, and to acquire
84 and enjoy property as other persons and corporations are permitted to do, without any fault or wrong on its part, or any just cause therefor, and this was fundamental error.

Third Proposition.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas, under Articles 9 and 10 of the Federal Constitution, and is therefore void, and it was error for the trial court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense.

Fourth Proposition.

It was error for the court to strike out appellant's special answer and defenses on exception, as shown in this assignment of error, because the answer disclosed a valid and just defense under the law, as administered in this State, and the practical effect of the action

of the court, and the rule of law adopted and applied at the trial, is in violation of the Constitution of the State of Texas, Section 19 of Article 1, in that its effect is to deprive appellant of its property, privileges and immunities, without due process of the law of the land.

Third Error.

This court erred in overruling appellant's third assignment of error, and propositions thereunder, said assignment and propositions reading as follows:

Third Error.

(No. 4 in the Record, Tr., p. 32.)

The Court erred in the second paragraph of the main charge which reads as follows:

"You are further instructed by the court that if you believe, from a preponderance of the evidence in this case, that the plaintiff L. V. Wallace is the successor of the firm of Barnes, Wallace & Co., and as such successor, if you find he is such successor, is the owner of the assets of said late firm and particularly of the claim, if any, involved in this suit; and if you further believe from a preponderance
85 of the evidence in this case that said Barnes, Wallace & Co., on October 10th, 1906, and October 23rd, 1906, and November 14th, 1906, delivered the mohair alleged by plaintiff to have been so delivered on said respective dates, and further find that said mohair, if any, was received by the defendant at Uvalde, Texas, and shipped and billed by defendant from Uvalde, Texas, to the Massachusetts Mohair Plush Co., at Lowell, Mass.; and if you further find that all or any part of such mohair, if any, never reached Lowell, Mass., or was never delivered to said Massachusetts Mohair Plush Co., then, if you *you* so find, you will find for the plaintiff."

Fourth Error.

The court erred in overruling appellant's fourth assignment of error, and propositions thereunder, said assignment and propositions reading as follows:

Fourth Error.

(No. 5 in the Record, Tr., pp. 32-33.)

The court erred in the first paragraph of the main charge, which reads as follows:

"You are instructed by the court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and as such common carrier is liable to any person who delivers freight to it, or its duly authorized agents, for transportation from a point in one State to a point in the same or any other State of this Union, said freight being received by said defendant at the one point, and billed by it to the other point, for any damage or loss accruing to said freight, after such receipt, and before delivery

to the consignee, at point of destination, provided said damage was not caused by some act of God, or at the hands of a public enemy."

Statement.

The two foregoing assignments were supported by four propositions, substantially alike, as follows (see appellant's brief, pp. 54 to 60):

First Proposition.

One of the vices of the charge is, that it makes appellant liable absolutely for the safe delivery of the mohair at destination, as though there was an express contract to be so bound, without exceptions or limitations, whereas, in fact, there was no such contract asserted or shown, but, on the contrary, the contract actually entered into limited all duty and liability as a carrier to appellant's own line.

Second Proposition.

The rule of law followed and applied in this charge is that
86 of the act of Congress of June, 1906, which law, and the act of the court in so enforcing and applying it, is violative of the Fifth Amendment of the Constitution of the United States, and Sec. 19, Art. 1, of the Constitution of Texas, because the practical effect of it is to take the property of appellant without just cause or compensation, and without due process of law, and bestow it upon another, against whom appellant has committed no wrong or breach of contract.

Third Proposition.

The practical effect of this law, and the action of the court in applying it, is to deny appellant the equal *proposition* of the law in making contracts, in acquiring and enjoying the use of property, and in the exercise of privileges and immunities such as other carriers, persons and corporations may, and it is therefore in violation of the purpose and spirit of the Fourteenth amendment to the Constitution of the United States, as well as the bill of rights of the Constitution of Texas.

Fourth Proposition.

The act of Congress of June 29th, 1906, upon which this cause of action is based, and which was adopted and given to the jury in charge by the court, is an invasion of the reserved rights and the special legislative prerogative of the State of Texas, and violates Articles 9 and 10 of the Federal Constitution."

Statement.

The two paragraphs of the main charge were given in the language quoted. (See main charge, Tr., pp. 32 and 33.)

Fifth Error.

This court erred in overruling appellant's fifth assignment of error, and propositions thereunder, said assignment and propositions reading as follows:

Fifth Error.

(No. 3 in Record, Tr., pp. 31-32.)

87 The court erred in excluding from the jury, when offered in evidence by defendant, certain stipulations and parts of the bill of lading, which read as follows:

"It is understood and expressly stipulated that the liability of the Galveston, Harrisburg & San Antonio Railway Company shall cease upon delivery to its next connecting line of the goods, merchandise and produce mentioned herein.

"Neither this company nor any of its connections or transfer lines which receive and transport said property will be responsible for damages (for certain causes not offered), or for any cause whatever not due to the company's negligence."

All of which more fully appears in bill of exception No. 2, which is made a part hereof.

First Proposition.

This contract was in all respects lawful and reasonable, and when supported by proof that it controlled the shipment and the parties, and was complied with fully, constituted a complete defense to the cause of action—assuming that the act of Congress did not, for any reason, apply—and it was error for the court to exclude it.

Second Proposition.

In striking out this evidence, and in following and applying the act of Congress of June 29th, 1906, the court erred, because the act referred to, and the action of the court in so applying it, are in violation of the fifth and Fourteenth amendments to the Federal Constitution and of Sec. 19, Art. 1, of the Constitution of Texas, in that the effect of it all is to take appellant's property without due process of law, and to deny it the equal protection of the law.

Statement.

The stipulations in the contract as copied were offered by appellant and excluded by the court on the ground that being in contravention of the act of Congress of June 29th, 1906, they were unlawful and void. (See bills of exception Nos. 1 and 2, Tr., pp. 26 to 28.)

Authorities.

On the constitutionality of the act of Congress, see:
5th and 14th Amendments to U. S. Constitution.
T. & P. Ry. v. Lynch, 97 Tex., 25.
Reagan v. Farmers Loan & Trust Co., 154 U. S., 420.
Central of Ga. Ry. Co. v. Murphy, 196 U. S., 194; 25 Sup.
88 Ct. Rep., 218.
Venning v. Ry. (S. C.), 49 Amn. & Eng. Ry. Cases, New Series, 673 and 674, 38 S. E., 983; 12 L. R. A. (N. S.); 1217.
Ry. v. Tobacco Co., 169 U. S., 311; 18 Sup. Ct., Rep., 335.
Munn v. Ill., 94 U. S., 113.
Yeck Wo v. Hopkins, 118 U. S., 356.
Adair v. U. S., 28 Sup. Ct. Rep., 277 (not yet officially reported).
Jacobson v. Massachusetts, 197 U. S., 11; 25 Sup. Ct. Rep., 358-362.
Lochner v. N. Y., 198 U. S., 45; 25 Sup. Ct. Rep., 539-543, and cases cited.
Gibbons v. Ogden, 9 Wheat, 1, 196; 6 L. Ed., 23, 70.
Champion v. Ames, 188 U. S., 321; 23 Sup. Ct. Rep., 321.
Holden v. Hardy, 169 U. S., 366.
Allgeyer v. Louisiana, 165 U. S., 578; 17 Sup. Ct. Rep., 427.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Mugler v. Kansas, 123 U. S. 623.
Ry. v. Smith, 173 U. S., 684.

That appellant's special answer showed a perfect defense in the absence of the act of Congress in question, see:
McCarn v. Ry., 84 Tex., 352, and cases cited.
Jackson & Edwards v. Ry., 89 S. W., 968.
2 Parsons on Cont., 9th Ed., 227.
Moore, on Carriers, 457-462, Sec. 8.

Argument.

The act of Congress of June 29th, 1906, in so far as it attempts to compel the initial carrier to accept interstate shipments of property, and to deliver them at destination in another State at his peril, holding him liable as at common law for the performance of such service absolutely, and for any loss or damage resulting, even upon the line of a connecting carrier over whom he has no control—if this is the proper interpretation of it—is not a proper and necessary regulation of interstate commerce by Congress, but is an unnecessary and arbitrary burden imposed upon the carrier for the mere convenience of the shipper, and in this act Congress exceeded the power embraced in the constitutional grant.

The constitutional grant of power to regulate interstate commerce does not carry the authority to impose burdens on carriers engaged in interstate commerce not necessary to a reasonable and proper regulation of matters of general concern. This rule exists inde-

pendent of constitutional limitations. It is said by Mr. Tide-
89 man in his Treatise on the Limitations of Police Powers, p. 10, that: The unwritten law of this country is, in the main, against the exercise of police power, and the restrictions and burdens imposed upon persons and private property by police regulation are jealously watched and scrutinied." Citing and quoting from Berthold v. O'Reilly, 74 N. Y., 509, as follows: " 'The main guaranty of private rights against unjust legislation is found in that memorable clause in the bill of rights, that no man shall be deprived of life, liberty or property without due process of law. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destriction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith, or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without its dismemberment, the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life, the right of property, the right to acquire property and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.' " (Italics our own.)

And continuing, the author says: "In searching for constitutional restrictions upon police power, not only may resort be had to those plain, exact and explicit provisions of the constitution, but those general clauses, which have acquired the name of glittering generalities, may also be appealed to as containing the germ of constitutional limitation, at least in those cases in which there is a clearly unjustiable violation of private right. Thus, almost all of the State constitutions have, incorporated in their bills of rights, the clause of the American Declaration of Independence that all men 'are
90 endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' If, for example, a law should be enacted which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizen unnecessarily, and in such a manner that it did not violate any specific provisions of the Constitution, it may be held invalid, because in the one case, it interfered with the inalienable right of property, and in the other case it infringed upon the natural right to life and liberty. 'There is living power enough in those abstractions of the State constitutions, which have heretofore been regarded as mere "glittering generalities," to enable the courts to enforce them against the enactments of the legislature, and thus declare that all men are not only created free and equal, but remain so, and may enjoy life and pursue happiness in their own way, provided they do not interfere with the freedom of other men in the pursuit of the same objects.' " (Citing People v. Turner, 55 Ill., 280.

Again, on page 12, the author says: " 'Powers which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and

well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.' (Italics our own.) And in all such cases it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power, which is generally prohibited by the Constitution. 'It is the province of the law-making power
91 to determine when the exigency exists for calling into exercise the police power of the State, but what are the subjects of its exercise is clearly a judicial question.'" Citing and quoting from People v. Jackson, 9 Mich., 285, and Lakeview v. Cemetery, 70 Ill., 192.

In the contentions here submitted we are not unmindful that by reason of the public nature of the use to which appellant has devoted its railroad property, it has, to some extent, ceased to be juris privata. One who devotes his property to public use undoubtedly clothes his property with a public interest, and grants to the public an interest, not in the property, but in its use, and must submit that use to the control of legislatures for the common good. But this applies only to the extent of general public necessity, and not to the mere conveniences of the users. The right to regulate within the meaning of this general principle is not the right to destroy or impair. It extends only to the right to make reasonable appropriate and necessary regulations, to fix reasonable charges to prevent imposition or oppression, to require impartial treatment, and to promote the unrestricted flow of interstate commerce.

Munn v. Ill., 94 U. S., 113.

Special attention is also invited to the dissenting opinion of Mr. Justice Field in this case.

The police power of Congress is much more restricted than is the similar power of the several States, for the obvious reason that it is a government of delegated powers, and is, therefore, confined to that which is conferred by the Constitution. Numerous examples exist where attempts by the States to exercise this power over individual rights have been held unauthorized for want of general necessity therefor, and because the acts were unreasonable.

An ordinance of the City of San Francisco, setting apart a
92 portion of the city for the Chinese, and requiring all persons of that nationality to locate and reside and conduct their business there, irrespective of calling, moral character or physical condition, was held to be void, because its effect was unjust and oppressive, and did pretend to be for the promotion of the safety, health or good morals of the city.

In re Lee Sing, 43 Fed., 359.

And another ordinance, which authorized a certain board of supervisors to allow or forbid the use of frame buildings to conduct laundries in, at the mere pleasure of the board which was, in practice, applied to Chinese only, was held void for the same reason.

Yeck Wo. v. Hopkins, 118 U. S., 356.

The legislature of New York enacted a law applying to cities of 500,000 inhabitants, forbidding the manufacture of cigars in any tenement house occupied by three or more families, except on the first floor of such houses, and in which there was a store for the sale of cigars and tobacco. This was also held void for similar reasons.

In re Jacobs, 98 N. Y., 98.

The City of Jacksonville, Ill., enacted an ordinance requiring the railroad company to keep a flagman stationed at a particular street crossing, where, as it appeared from the facts, the danger to the public was not sufficient to authorize this unusual expense and care to be incurred when simpler and less expensive provisions could be made which would give protection. This ordinance was held unreasonable and void.

Ry. v. City of Jacksonville, 67 Ill., 37.

In the case of Central of Georgia Ry. Co. v. Murphy, 196 U. S., 194, the court had under consideration a statute of the State of Georgia somewhat similar to the one here in question. The Georgia statute was held unconstitutional, because it was an attempt to regulate interstate commerce. The Supreme Court say that the

effect of such legislation is not to promote interstate commerce,
93 but it is calculated to burden and retard it. If that was

true of the Georgia statute, it is likewise true of the statute in question, and neither a State legislature nor Congress has the power to so burden and retard interstate commerce.

In passing upon that case, the court used the following language, significant in this case, for the purpose of showing the view that court will probably take of the act of 1906: "The loss or damage might occur on the line of a connecting carrier, outside the State where the shipment was made (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company receiving the freight from the shipper has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment, or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the *for the* loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce: it prevents a valid contract of exemption from taking effect upon a very onerous condition, and it is not of that class of State legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract unless such carrier comply with the provisions of the statute by obtaining information

which it has no means of compelling another carrier to give,
94 and yet, if the information is not obtained, the carrier is to

be held liable for the negligence of another carrier, over

whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." (Italics our own.)

The Supreme Court of the United States, in Reagan v. Farmers Loan & Trust Company, 154 U. S., 362, 14 Sup. Ct. Rep., 1047, covered the entire scope of the authorities and the reason in the following short paragraph: "The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that, under such a government, with its constitutional limitations and guaranties the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held." (Italics our own.)

It cannot be logically contended that it is a just and proper exercise of the power to regulate interstate commerce thus to take for private use the money of an innocent carrier, unless this is necessary to the preservation of property rights of the general public. If common carriers were, as a class, corrupt, and engaging in a widespread practice of "freebooting", it would be a proper exercise of the police power of the several States to lay reasonable restraints upon the guilty, and, in a proper case, this power might be exercised by Congress, but it is doubtful, because each wrong would be an offense against the local jurisdiction of a particular State, where there resides ample power to protect and to punish.

95 But in no case could the punishment of the innocent be justified as a remedy for wrongs of this character suffered, not by the multitude collectively, but by certain isolated individuals who patronize carriers, and who may, or may not, in the aggregate constitute a considerable proportion of the entire population. In order to illustrate the fallacy and want of logic in the theory of the law—if that be its theory—we need only to say that if you could lawfully compel one innocent person to respond in damages to another for the wrong of an entire stranger to him, you would have a peculiar alleviation (?) of wrongs, with the evil still existing. You would be taking from one innocent citizen, under forms of law, his money, to reimburse another from whom a stranger had taken a similar sum. After the administration of this rule, you have not punished the guilty, nor have you made him disgorge. You have simply made another victim. You have transferred the burden of the wrong to another innocent man's back. The latter, as a wrong, is more reprehensible than that of the one who caused the loss, because it is perpetrated by the Government upon a helpless victim, who cannot resist. It should be likened to the case where a guardian administers the lash to his innocent ward, because of the incorrigible conduct of another ward. It is no answer to our contention to say that the law has afforded the last victim a remedy against the wrong-

doer. The government has no right to take the money of a citizen in exchange for a chose in action, however good it may appear to be.

But this remedy, which the government so charitably provides the victim for the money taken, is in fact no remedy. It is a law suit, which may not be fruitful. In other words, the victim is subrogated to the complainant's rights, whatever they were, but the judgment is not made, and could not have been made res judicata of the issue of liability against the supposed wrong-doer.

96 Pennoyer v. Neff, 95 U. S., and cases following it.

It may transpire that the wrong-doer lives in a remote part of the United States, or in Mexico, or the Dominion of Canada. It is not clear that the act does not attempt to apply to foreign shipments, but this is not material to the point here under consideration.

When the victim of the law goes to the domicile of the wrong-doer—if in fact there was a wrong-doer, and if he may ever discover which of the many connecting carriers did it to prosecute against him the supposed cause of action, which his government has so generously bestowed upon him, he has no assurance that the supposed wrong-doer himself has not an ample defense.

But for what good reason is the burden of this risk and expense of litigation imposed upon the initial carrier? Is it because he is possessed of wealth, experience, or means of information, and the sinews of war peculiarly adapted to the successful prosecution of this class of legal warfare, and which will, with absolute certainty, insure victory in such suits against his new antagonist? If so, it is based upon very peculiar logic, for is it not true that the new antagonist, being himself a carrier, must likewise, by the same rule, be presumed to be equally as well equipped for such a contest? If the law's victim loses, as against his new antagonist, the result is, without doubt, spoliation. See Venning v. Ry., supra. With the same propriety the rule could be applied by Congress to all interstate passenger traffic also. The application of this rule to passenger traffic would produce very disastrous results.

If Congress had the power to do so, and would provide for the trial of all the issues as between the plaintiff and all carriers in one
97 action, then there would be some semblance of justice in a rule which would, in such an action, apportion the loss between the carriers upon a rate or mileage basis, or some other equitable basis, where the wrong could not, in whole or in part, be located.

If Congress has not the power to confer jurisdiction upon the Federal courts of one State over the persons of railroad companies domiciled in other States, for the purpose of trying cases like the one in question, then it would seem that such a remedy as was attempted could not, under any plan, be given the shipper without violating the Constitution. But it is unprofitable to discuss what Congress might have done. There was no attempt to give an adequate remedy against the real wrong-doer. The proviso that the initial carrier may have his remedy against the wrong-doer is a legislative joke.

There is at least a semblance of justice in the Texas law of similar import—R. S., Arts 331*a* and 331b—because in the first place, it

applies only upon through contracts adopted by the connecting carrier, and, in the second place, under other provisions of the statute, all the carriers may be joined in one action, and the damages may be apportioned and assessed against the real wrong-doers.

It cannot for a moment be contended that superior wealth, experience or means of information is a justification to impose such a burden upon an unoffending carrier. It could only be claimed to be necessary because the shipper would otherwise be required to go to a remote locality to litigate for his supposed rights. But this difficulty would not be obviated by the methods of this law, because it leaves the same cause of action in existence, with the same necessity to go to the same locality, at the same or greater expense, and at greater risk of loss, to litigate. The burden would only be transferred to other innocent shoulders, as before stated, with infinitely greater chances of loss, and without any hope of reimbursement, should the
98 litigation be unsuccessful.

Ry. v. Murphy, supra.

Is the act of Congress in question susceptible of the construction placed upon it by the trial court and the Court of Civil Appeals?

In this case the record shows, without dispute, that the property was carried by plaintiff in error on a contract under which it agreed to carry the property to the end of its own line, only, and there deliver it to its connecting carrier, after which its liability should cease entirely, and it appears in the excluded answer that plaintiff — error was prepared to prove, had it been permitted to do so, that it had fully complied with all that it contracted to do. Its right to plead and prove this defense was denied it in the trial court, and the verdict and judgment were necessarily for defendant in error, because plaintiff in error could not meet the requirements of the trial court and show delivery of the property at destination or that it was lost or destroyed because of an act of God or the public enemy.

The amount involved in this case may not exceed $500, including all costs, but the result would be the same had the shipment in question been 1,000 bales of cotton, of the value of $50,000. The destruction of large quantities of cotton in transit, on compress platforms and in cars, or on shipboard are very common occurrences. In such cases the burden might fall on the contracting carrier with sufficient force to destroy his business.

In view of such probable consequences, we submit to the court that it is unreasonable to assume that Congress intended, by the act in question, to arbitrarily take the initial carrier's property to compensate the shipper for loss or damage to his property, resulting
99 from the wrong of a stranger, without some kind of an undertaking, express or implied, on the part of the initial carrier to be so bound. We therefore suggest that the proper interpretation of the act is found in Root v. Great Western Ry. Co., 45 N. Y., 524 (1871), where the Court of Appeals of New York construed a legislative act of that state of 1847 so similar in language and effect to the law in question as to raise the inference that this act, commonly known as the Carmack amendment, was taken from the New York statute.

The New York law reads as follows:

"Any railroad company receiving freight for transportation shall be entitled to the same rights, and be subject to the same liabilities, as common carriers.

"Whenever two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become liable to pay any sum, by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the company or companies by whose neglect or misconduct it became so liable."

In the case referred to, the defendant railway company was shown to have been a common carrier between Suspension Bridge, in the State of New York, and Detroit, Michigan, where it had arrangements with the Michigan Southern Ry., whereby the latter company received for further transportation all freight destined to points beyond and west of Detroit, which should be delivered to it by defendant. Root delivered to the New York Central Ry. Co., at Victor, New York, a package for shipment to a point in Michigan on the line of the Michigan Southern Ry., upon an express contract that the contracting carrier should transport the package to its warehouse at Suspension Bridge, and should not be liable for loss or injury to the property thereafter. The initial carrier safely transported the package to Suspension Bridge, and delivered it to defendant,
100 Great Western R. R. Co., who in turn safely transported it thence to Detroit, and delivered it to the Michigan Southern Ry. Co. On the same day the warehouse of the Michigan Southern Ry. Co., together with the package, was destroyed by fire. The shipper, Root, sued the Great Western R. R. Co. for the damages, relying upon the statute of 1847 above set out. Plaintiff's judgment recovered in the trial court was reversed by the Court of Appeals, that court construing the statute to be declaratory only, and to apply only to cases where there was an express or implied agreement to carry to the place of destination, when such destination was on another line. The power on the part of a carrier to make contracts to carry freight beyond its own line having been doubted, it held that this act was intended only to settle the validity of such agreements, and to enforce them, and it was not intended to create a liability to carry to a destination not on that carrier's line, where there was no contract so to be bound. In that case it was said by the court:

"The apparent injustice of holding a company subject to the liability declared by the statute, in cases where the provisions of the same statute giving a remedy over against the defaulting road could not operate, was obviated (in Burtis v. Ry., 24 N. Y., 269, where this act was first construed) by holding that the liability is not imposed by the statute, but must be voluntarily assumed by the carrier."

From a careful reading of the opinion in that case, it would seem

that, but for the construction given it, the court would have held the act unconstitutional. If the Carmack amendment was borrowed from the New York Statute—and with one exception, presently to be noticed they are identical in legal effect—is it not true that the New York interpretation and construction of it settled in 1891 must accompany it?

The one point of difference between the New York statute and the Carmack amendment is, that the latter carries a clause forbidding the carrier to incorporate in his agreement any stipulation in contravention of the requirement of the act to deliver at destination, or become liable, as at common law. In other words following the New York construction, it means that, having agreed (and it requires in all instances the issuance of bills of lading) to carry an interstate shipment of property to destination on another carrier's line, a limitation of liability as it existed at common law shall not be embraced in the contract.

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If we are correct in the contention that the New York construction is the correct one, and must prevail, then it would seem without doubt that the proviso referred to above as the only point of difference between the State and Federal statutes, is also declaratory, and can have no higher dignity than the main provisions of the article, and it must, therefore, be construed as indicated above.

If this be the proper interpretation of the law, it was misconstrued by the trial court and the Court of Civil Appeals, and plaintiff in error was erroneously deprived, by the trial court, of an ample defense to the cause of action, by striking out its special answer, and thereby excluding the testimony to sustain it.

If the act of Congress known as the Carmack amendment was properly interpreted and applied by the trial court and the Court of Civil Appeals in this case, then we insist, in addition to the claim already presented, that Congress, in this amendment, exceeded the authority granted, and that the amendment itself violates the State and Federal Constitutions in the particulars stated in all the specifications of error.

The amendment in question reads as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

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"That the common carrier, railroad, or transportation company, issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained,

the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

In the outset we desire to invite the attention of the court to the well settled principle of law that what a carrier may have at times voluntarily chosen to do cannot be forced upon him without his consent, and it furnishes no rule by which to determine the reasonableness of a regulation. See Ry. v. Smith, 173 U. S., on page 697. Attention is also invited to another well established principle of law that a carrier cannot refuse to accept interstate shipments of property properly tendered for transportation, merely because its destination is beyond the end of his line.

York Mfg. Co. v. Ry., 3 Wall., at p. 112.
Ry. v. Central Stock Yards (Ky., 1906), 97 S. W., 778.

But, as if there existed a doubt about this proposition, the Carmack amendment itself requires this service.

It is also, in effect, held, in Ry. v. Smith, supra, that a legislative act which deprives the initial carrier of the right to make, in good faith, a contract not malum in se, made for the reasonable protection of its property and business, is a taking of property without due process of law, and violative of the Fifth Amendment of the Federal Constitution. This principle is well sustained in other cases to be hereafter cited and discussed.

Contracts designed to promote immoral principles, or in restraint of trade, such as the transportation of lottery tickets (188 U. S., 321), and agreements to fix and maintain a standard of prices or rates (171 U. S., 570), fall in the class of contracts sinister and evil in their effect, and therefore not within the rule of protection insisted upon.

103 The private right of contract has been controlled in the past, as before stated, and justly so, where the lives, health and morals of the people were concerned. Governments must necessarily have the inherent power to protect the lives, health, morals and property of its people. It is this right of self-preservation out of which the theory of police power was evolved. In fact, the very rights protected by the provisions of the Constitution here invoked are based upon the same recognition of inherent right. Indeed, the preservation of the inherent rights of the individual is esteemed more important than the existence of the government, for the government itself was instituted to preserve them. From this it must follow that, to justify the invasion, however slight, of such rights there must be a necessity to conserve, in a general way, for the protection of life, liberty, property or the morals and good order of the people. Beyond this the police power cannot go. Lochner v. N. Y., supra. Other cases coming within this rule are: Holden v. Hardy, 169 U. S., 366, upholding a statute regulating the hours of labor in the unhealthful employments of coal mining and smelting ores; Jacobson v. Massachusetts, 197 U. S., 11, 25 Sup. Ct. Rep., 358, upholding a law requiring vaccination, and Petet v Minnesota, 177 U. S., 164, 20 Sup. Ct. Rep. 566, upholding a statute declaring

that shaving is not a work of necessity or charity, and requiring all barber shops to be closed on Sunday.

For a general discussion of this subject see Allgeyer v. Louisiana, 165 U. S., 578, 17 Sup. Ct. Rep., 427, and Lochner v. New York, supra.

It cannot possibly affect the rule stated because of the public nature of appellant's business, because the constitutional inhibitions apply to all persons, natural and artificial alike. (Ry. v. Smith, 173 U. S., 684.)

104 In the matter of the transportation of interstate commerce, the carrier violates no moral principles, nor does he infringe upon any one's rights when he insists upon the right to make contracts of carriage to the ends of his own rails only, and to absolve himself from further liability by delivering the property to the next carrier on the designated route. It is but the thoughtful exercise of good business judgment and foresight to refuse to be held liable for the default and wrongs of strangers over whom he has no control. Such contracts are founded in good faith, and sound business and moral principle, and common honesty, and for all time the right to make such a contract has been esteemed to be among the most valuable guaranteed by the State and Federal Constitutions.

It is no answer to this proposition to say that public policy is to be determined by the legislative body. The Constitution is supreme, and the legislative body cannot, under guise of declaring public policy, or the exercise of police power, arbitrarily deprive the citizens of such natural right.

The shipper of interstate commerce has no natural right to complain of the initial carrier for the wrong of one who is an entire stranger; on the contrary, the initial carrier like any other person, has a natural right to his money and property and his business, and to preserve and enjoy them as against the claims of one against whom he has committed no wrong, and has the natural right to make contracts not against public policy. It is, in fact, rather against good morals and public policy to destroy such rights, and such oppression is calculated to impair the faith and confidence of the people in their government. The right to make such a contract is a property right protected by the Constitution. Southern P. Co. v. Interstate Com. Com., 200 U. S., 536, at p. 556, 26 Sup. Ct. R., 330.

105 The rule enacted in the statute in question, as we have shown, is not for the legitimate protection of any right of the shipper against the initial carrier, but is intended to serve his private convenience only and is, therefore, wholly unsustained by any principle of justice or sound morals.

Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Yeck Wo. v. Hopkins, 113 U. S., 356; 6 Sup. Ct. Rep., 1064.
Crowley v. Christensen, 137 U. S., 86; 11 Sup. Ct. Rep., 13.

An example of unauthorized legislative interference with the rights of the citizen in his private right of contract by Congress is found in the act of June 1st, 1898 (U. S. Comp. St. 1901, p. 3205). Sec. 10 of that act made it a penal offense for any agent or officer

of an interstate carrier, having full authority in the premises from his principal, to discharge an employé from the service of such carrier because of his membership in a labor organization. This act was held unconstitutional in Adair v. United States, — U. S., 28 Sup. St. Rep., 277, reversing the judgment of the District Court, 152 Fed. Rep., 737.

We take the liberty to quote here a part of that opinion as follows: "This question is admittedly one of importance, and has been examined with care and deliberation; and the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason.

"The first inquiry is whether the part of the tenth section of the act of 1898, upon which the first count of the indictment was based, is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of
106 the right of property, guaranteed by the amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject, to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that 'in every well ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' Jacobson v. Massachusetts, 197 U. S., 11, 29; 49 L. Ed., 643, 651, 25 Sup. Ct. Rep., 358, 362, and authorities there cited. (Italics our own.) Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employé of the railroad company upon the terms offered to him. Mr. Cooley, in his Treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the
107 result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal con-

cern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.'

"In Lochner v. New York, 198 U. S., 45, 53, 56; 49 L. Ed. 937, 940, 941; 25 Sup. Ct. Rep., 539, 541, 543, which involved the validity of a State enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employé in such an establishment to work in excess of a given number of hours each day, the court said: 'The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S., 578; 41 L. Ed., 832; 17 Sup. Ct. Rep., 427. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed "police powers" the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S., 623; 31 L. Ed., 205; 8 Sup. Ct. Rep., 273; Re Kemmler, 136 U. S., 436;
34 L. Ed., 519; 10 Sup. Ct. Rep., 930; Crowley v. Christen-
108 sen, 137 U. S., 86; 34 L. Ed., 620; 11 Sup. Ct. Rep., 13; Re
Converse, 137 U. S., 624; 34 L. Ed., 796; 11 Sup. Ct. Rep.,
191. * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.' Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people." (Italics our own.)

In another place, in the same opinion, the court say:

"We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat., 1, 196; 6 L. Ed., 23, 70; Lottery Case (Champion v. Ames), 188 U. S., 321, 353; 47 L. Ed., 492, 500; 23 Sup. Ct. Rep., 321.

"It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment, and as not embraced by nor
109 within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce, and, as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty, as well as the right of property of the defendant Adair."

In the well considered case of Venning v. Ry. (S. C.) 38 S. E. R., 893; 12 L. R. A. (N. S.), 1217; 49 Amn. & Eng. Ry. Cases (N. S.), 666, a statute of the State of South Carolina, similar to the statute of the State of Texas, passed upon in Ry. v. Lynch, (97 Tex., 25), was under consideration. The South Carolina Statute, like the Texas statute, was held bad, in so far as it attempted to apply to interstate commerce, but, like the Texas statute, it was held a proper exercise of authority, in so far as it applied to intrastate commerce, and this conclusion was reached because, notwithstanding the act imposed liability upon the carrier sued, for the default of another carrier, it was so held because this was true only when the former had, by adoption of the contract, become a party to the agreement for through transportation; and also because it left him free to avoid this liability by repudiating the original contract.

In the Venning case the court in part say:

"The defendant submits that the act is obnoxious to the Fourteenth Amendment of the Constitution of the United States, and Section 5, Article 1, of the Constitution of South Carolina, in that it denies to common carriers the equal protection of the law, and should be declared void even as to the transportation of goods by connecting lines entirely within the State. The argument in support of this proposition is strong, but we do not think it is conclusive. While the law making branch of the State government has no power to require persons or corporations to make contracts, it has in general the power to regulate the business of public transportation
110 within its borders. Considered with respect to such business, in this act, the General Assembly has, in effect, forbidden a common carrier to recognize, acquiesce in, or act upon a through contract of shipment made by a shipper owner or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier. But the carrier may avoid this liability for the default of another by refusing to recognize, acquiesce in, or act upon the through contract of shipment. A carrier, it is true, is required by Section 2177 of the Civil Code of 1902 to forward freight sent on another road 'according to the directions contained thereon, or accompanying the same,' and we think, aside from

this statute, the common law imposes the obligation upon the carrier to receive and forward goods tendered by another carrier, just as if they were tendered by the owner. But in doing so it need not recognize, acquiesce in or act upon the through bill of lading. It may receive the goods, give its own receipt, charge its own freight, and in all respects repudiate or disregard the through bill of lading. By thus refusing to recognize, acquiesce in or act upon the through bill of lading, it would avoid liability for the default of another. It cannot, therefore, be said that the statute denies to the carrier the right to prosecute its business, except upon condition that it shall become liable for the defaults of others."

In passing upon the Texas statute, which, as before stated, is similar to the South Carolina statute passed upon in the Venning case, Judge Gaines, speaking for this court, in T. & P. Ry. v. Lynch, 97 Tex., 25; 75 S. W., 486, says: "But, in our opinion, it was not intended to authorize a suit against two railroad companies not acting under a joint contract for the distinctly separate wrong of one merely because property had been transported over the con-
111 necting lines of the two. It would in our opinion, be difficult to justify such legislation upon any correct principle. If, for example, the cause of action was against the second carrier company for a total destruction of the property on its line by a railroad wreck, why sue the first who did not contract to carry beyond its own line, and was in no manner responsible for the loss of the property?" (Italics our own.)

The Court of Appeals of the State of New York, in the case In re Jacobs, supra, among other things, on this point say: "Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law.'"

In the case of Mugler v. Kansas, 123 U. S., 623, the court, among other things, say: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

112 See also—

State v. Dircks (Mo.), 111 S. W., 1, and
Ry. v. State (Ark.), 111 S. W., 456.

In this connection we again invite the attention of the court to the quotations hereinbefore set out from Ry. v. Murphy and Reagan v. Farmers' Loan & Trust Co.

The purpose and effect of the Carmack amendment is to supply the shipper a convenient victim, from whose property he may reimburse himself for the wrong done him by some stranger at a distance. The policy of the law seems not to concern itself with such trifling matters as the guilt or innocence of the victim; its chief concern seems to be the convenience of the victim to the shipper.

From any point of view this feature of the act is, in our humble judgment, indefensible upon any sound principle.

Is it not true that this amendment, by reason of the provisions of Section 1, is an arbitrary and unjust classification as between carriers engaged in the same character of business?

It seems to be perfectly clear that, under the provisions of Section 1 of the act of February 4th, 1887 (Fed. Stat. Ann., Vol. 3, p. 809), this statute, in all its provisions, applies only as against common carriers "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a continuous carriage or shipment from," etc. Its terms do not include carriers by water.

U. S. v. Morsman (1890), 42 Fed., 448;
Ex parte Koehler, 30 Fed., 869.
Ry. v. Int. St. Com. Com., 162 U. S., 197.

An action for damages under the interstate commerce law is one to recover money in the nature of a penalty. The suit here under consideration is highly penal in its nature.

113 Ratican v. Railway (1902), 114 Fed. R., 671.
Parsons v. Railway (1897), 167 U. S., 447.

In this case it appears from the pleadings of appellant, excluded by the court, that one of the carriers in the chain of carriage of this shipment was an independent steamship line. Courts will judicially know that independent lines of carriage exist by water coastwise, and by inland lakes and rivers, connecting hundreds of commercial marts on our seaboard in the United States and adjacent countries, and that these carriers are commonly engaged—in fact, the majority are exclusively engaged—in the interstate carriage of freight and passengers, and very extensively so engaged. These carriers are not embraced within the provisions of the act, and may, therefore, pursue their business—which is identical with that of appellant and all others who carry by rail and water under one control—and may compete for the business, without being subjected to the severe penalties and onerous burdens of this law. There is no just reason for exempting from the provisions of this act that class of carriers referred to. On the contrary, if the object of the law is to promote interstate commerce, and protect the shippers, and if this could lawfully be done in the manner attempted by Congress, the class of carriers exempted, of all others, should have been embraced therein, because they carry an immense amount of the interstate traffic of the

country, and as a rule are less responsible than railroad companies, while the risk of carriage of property by that method is much greater.

In the case at bar the property was, as a matter of fact, routed by way of two independent steamship companies. It is not material that such a condition actually existed in this case. It is of special importance only by way of illustration. Had appellee's mohair been lost through the negligence of either one of the steamship
114 lines, appellant would probably have been without remedy against it, dependent upon the construction of the act. On the other hand, had an independent steamship or steamboat line originated the shipment, the law would not apply, notwithstanding the greater portion of the transportation was by rail.

It is possible for a very large proportion of the interstate traffic of the country to originate with carriers by water exclusively. All of this immense traffic cannot, in our judgment, be embraced within the provisions of the act of Congress, and the originating carriers are exempted from liability thereunder, as before shown.

From these conditions it appears that a very large number of common carriers, and an immense amount of interstate traffic, escape the drastic provisions of the law, and in the event that a carrier, exclusively by water, happens to be one of the connecting carriers, and the property is lost or damages through his fault, the initial carrier, if a railroad company, has no redress under the law, because under its terms, it is made to apply only to the latter, and if such be the propor construction of the act, the initial carrier could not recover the money forced from him under the act, and the result would be confiscation.

This question of legislative discrimination has been so often discussed by the United States Supreme Court—the controlling authority in this case—that we will content ourselves with the citation of a few only of the many cases on the subject decided by that court, and with the observation that, in our judgment, the situation here shown illustrates that the act in question falls on the wrong side of the line of demarcation drawn by the authorities. It is an unreasonable discrimination, and the result is not due process of law. The authorities cited have to do chiefly with State legislative enactments, but they apply with equal force to Federal statutes because
115 Congress has no more authority to arbitrarily discriminate against persons than the State legislatures.

Ward v. Maryland, 12 Wal., 418; 20 L. Ed. 449.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Ry. v. Ellis, 165 U. S., 158; 17 Sup. Ct. Rep., 255.
New York v. Roberts, 171 U. S., 683; 19 Sup. Ct. Rep., 77.
The dissenting opinion of Mr. Justice Harlan and cases cited
Yeck Wo v. Hopkins, 118 U. S., 356.

We are not unmindful that the Fourteenth Amendment to the Federal Constitution is primarily a limitation upon State legislation, but it must necessarily also be a limitation on congressional legislation, when considered in connection with the preamble to the Con-

stitution, and in view of Section 2 of Article 4, and of the Fifth Amendment.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas under Articles 9 and 10 of the Federal Constitution, and is, therefore, void, and it was error for the trial court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense.

Bridge Co. v. Kentucky, 154 U. S., 204; 14 Sup. Ct. Rep., 1087.
Budd v. New York, 143 U. S., 517; 12 Sup. Ct. Rep., 468.
Munn v. Illinois, 94 U. S., 113.
Piek v. Ry. Co., 94 U. S., 164.
Ry. v. State of Iowa, 94 U. S., 155.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Yeck Wo v. Hopkins, 118 U. S., 356; 6 Sup. Ct. Rep., 1064.
Crowley v. Christensen, 137 U. S., 86; 11 Sup. Ct. Rep., 13.
Arts. 9 and 10, U. S. Constitution.

The act of Congress of June 29th, 1906, in so far as it compels the carrier of a state to contract for the carriage of interstate commerce to its final destination, and become liable therefor, as at common law, for the wrongs and defaults of strangers in another State, is an invasion of the sovereignty of the States. While it is true that the trunk lines of railroad in this and all other States are neces-
116 sary agencies in the conveyance of interstate commerce, to such an extent that the fact must be judicially known, nevertheless their maintenance and their preservation are purely questions of State concern. They are local highways. Their charters and franchises are granted by the State, and quasi-public duties of very great importance to the State, and of peculiar local interest, are necessarily imposed upon them for the benefit of the citizens of the State.

It cannot be doubted that the legislature of a State may, within the exercise of its police power or sovereignty, prohibit railroad companies, created by its authority, from making contracts that would probably impair their ability to discharge their public duties to the people within their local jurisdiction, even though this might indirectly affect interstate transportation. It would seem to be clearly within the special province of the State to regulate the business of its own railroad companies and other citizens in the conduct of their business, except where the exercise of this power would impose a burden or restriction upon interstate commerce.

A regulation of the carrier's business by a State cannot be said to be in violation of what is known as the interstate commerce clause of the Constitution, unless such regulation directly impedes the flow of such commerce. A law that would prohibit the making of a contract, the result of which might impair the ability of the carrier to discharge its public duties to the State, could not be said to be a burden upon, or an impediment to, the flow of interstate commerce.

See Munn v. Illinois, supra. In this case it was also asserted that Section 8, Art. 4, of the Federal Constitution operates only as limitation of the powers of Congress, and does not affect the States in the regulation of their domestic affairs.

An example of the right of the State to control the contracts
117 of its railroad companies is our statutory regulation of the issuance of mortgages and bonds. If it be true that voluntary contracts by common carriers, wherein they undertake to assume liabilities, endangering their stability and usefulness, can be prohibited by the State, then it ought to follow as a necessary result that Congress cannot impose such burdens by force of statute without encroaching upon the special prerogative of the State, and, therefore, that part of the act of June 29th, 1906, which creates the liability asserted by appellee in this case, violates the Federal Constitution.

The contention of appellee that the innocent local carrier ought to be required to pay for the wrong of a carrier in another State, over whom it can exert no control, and with whom it has no connection, is a contradiction of the theory that the constitutional power to regulate commerce between the States was given to Congress for the purpose of promoting such commerce, and inducing carriers to engage in it, to the end that a general interchange of products should be fostered and induced to flow without interruption among the States. It was said in Howard v. Ry. Co. (1908), 28 U. S. Sup. Ct. Reporter 147, the court speaking of the contention that when a carrier engages in interstate commerce he submits all his business concerns to the regulation of Congress: "It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that, if the contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate
118 all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been and must continue to be under their control so long as the Constitution endures."

It is manifest that the practical workings of this act are calculated to retard that free exercise of the right which existed, in spite of the constitutional provision in question, to engage in interstate commerce. It not only retards the sale of but the carriage of interstate commerce, by imposing penalties and restrictions upon the carrier who engages in it, which might possibly ruin and bankrupt him.

The exercise of this power over the right to contract might be attended with serious consequences to the State the general public of the state, as well as the individual carrier. The case here under

consideration will serve as an example. Here we have a carrier and a shipper, both residents of the State of Texas.

At common law the appellant could not be required to contract to carry beyond the borders of this State, nor beyond the end of its own line. By reason of various State statutory restrictions and regulations it is required to keep and supply ample and reasonably safe road-bed, appliances and facilities to serve the public of this State, and it has no right by contract or otherwise to place itself in position whereby performance of these public duties and obligations may be put beyond its power, or whereby its ability to discharge them properly may be impaired.

The act of Congress, in effect compels it to accept all interstate freight tendered to it, and to assume all the liabilities of a common carrier as at common law to the ultimate destination of the freight. It goes further, and denies it the right to contract, respecting that shipment, restricting its liability to such loss and damage as
119 occur upon its own line.

Here are two citizens of a single State, who meet to contract, and it is not material to this discussion that one is a carrier, and engaged in the discharge of a quasi-public duty. The one would prefer a contract that would relieve him of all further risk and expense, and compel the other to land his products at destination in another State—it may be a shipment of the value of $500,000. The other is unwilling to make such a contract, because the loss of the shipment would bankrupt him. It would destroy his power to further continue in the carrrying business, and would place him in position where he could not comply with the public obligations assumed when his charter was granted.

In Texas we have a number of railroads which such a loss would bankrupt, and in Texas we have individuals and companies who might possibly desire to ship property in such quantities to the markets beyond the limits of the State.

The statute in question leaves the carrier no option. It does not even permit it to decline such a shipment. It must accept all freight tendered in proper form and at reasonable times and proper places or forfeit the right to do business and suffer practically the loss of all its property. If Congress should see fit to apply a rule to interstate passenger traffic, the result would speedily bankrupt all small roads in the country.

From what has been shown, it would seem to be clear that not only the free right of contract between citizens of this State is abridged by this act of 1906, but unfavorable, and it may be ruinous contracts are by force imposed by it upon the one without any reciprocal duty, obligation or consideration from the other for the extra risk and service.

The rights of the two parties, thus brought face to face for the purpose of contracting, is a matter purely of local concern,
120 which involves the property rights as well as possibly the existence of the carrier as such, and it is a usurpation of the power of the State for the Federal Government to step in and compel one of the citizens of a State to make a contract with the other which

might, without fault or wrong on his part, bankrupt him and destroy his business and its usefulness as a public utility to the people of the State.

There is no necessity for Congress to establish a uniform rule of this character, as contradistinguished from a convenience. It is not a matter which is incapable of regulation except by such a general rule. Indeed, it is a subject that has been otherwise regulated and controlled, that is by common law principles, for many years.

Suppose the State legislature, prior to the passage of the act of June, 1906, deeming it unsafe to allow corporate carriers, created under and by virtue of its laws, and under important public obligations to it, had forbidden such carriers to make interstate contracts of the character now arbitrarily imposed upon them by Congress by that act. Could it be said that it had no power to do so, even though it may have been deemed necessary for the preservation of the roads and their successful operation? If so, this conclusion could only be reached from a finding that the result directly burdened and obstructed interstate commerce, and did not merely operate upon it incidentally. Otherwise, the authority of the State could not be successfully challenged. But such finding is not logical. It is wanting in the sustaining element. The State legislative act would not result in burdening or obstructing commerce between the States if it tended to preserve the properties of the carriers and promote the efficiency of the service by husbanding their resources. This would actually promote the desired general commercial intercourse. It would sustain the cherished purpose of the Federal Constitu-
121 tion and would affect interstate commerce only in a remote and incidental way. Nor would it obstruct such commerce to any appreciable extent, by way of discouraging the shipper, because of any difficulty he might experience in collecting his claims for loss or damage occasionally arising, for we have seen interstate commerce grow to enormous proportions under these alleged discouragements. Redress has been given all litigants with meritorious claims and some without merit with remarkable regularity and in lavish proportions. We do not question that it would be a very great convenience to the interstate shipper to supply him a victim at his door, as hereinbefore suggested, but it is not a necessity; and if it were a necessity, the wrong doer would have to be brought to him for atonement, not an innocent man.

Such an act by a State legislature as the one suggested relates to the rights, duties and liabilities of the citizens of the State. It only indirectly and remotely affects the operation of commerce, and would, in our judgment, be clearly within the reserved power of the State, and within its exclusive prerogative. See:

Lake Shore & M. S. Ry. v. Ohio, 173 U. S., 285; 19 Sup. Ct. Rep., 465.

Hennington v. Georgia, 163 U. S., 299; 16 Sup. Ct. Rep., 1086.

Sherlock v. Alling, 93 U. S., 99.

Plumley v. Massachusetts, 155 U. S., 461; 15 Sup. Ct. Rep., 154.

Pittsburg & S. Coal Co. v. Louisiana, 156 U. S., 590; 15 Sup. Ct. Rep., 459.
L. & N. Ry. Co. v. Kentucky, 161 U. S., 677; 16 Sup. Ct. Rep., 714.
Geer v. Ry., 161 U. S., 519; 16 Sup. Ct. Rep., 600.
M. K. & T. Ry. Co. v. Hober, 169 U. S., 613; 18 Sup. Ct. Rep., 488.
New Mexico ex rel. McLean v. Denver & Rio Grande R. R. Co., 203 U. S., 39; 27 Sup. Ct. Rep., 1.

If it be true that the legislature of a State has the power to prevent its incorporated carriers from making contracts that might result in impairing their public usefulness, then it would seem to follow, without doubt, that Congress cannot enact regulations in conflict therewith.

122 Imperative public necessity, national in its scope, might require the interest of the State to yield, but in this class of cases no absolute necessity exists, as we have shown. On the contrary, the provision of the act is only intended to serve as a convenience, which is itself without necessity, logical reason or justice to support it, and not within the purview of the power to regulate interstate commerce.

Conclusion.

In conclusion, plaintiff in error respectfully submits that, for the reasons herein set out, it is entitled to the writ of error in this cause, and it accordingly prays for issuance and service thereof, and that, upon final hearing of this cause, it be reversed and dismissed, with judgment for all costs against defendant in error; but, should the court find that plaintiff in error is not entitled to have the cause reversed and dismissed, then it prays that the cause be reversed and rendered, or reversed and remanded, as the law and facts may warrant.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD,
W. B. TEAGARDEN,
G. B. FENLEY,
Attorneys for Plaintiff in Error, Galveston, Harrisburg & San Antonio Ry. Company.

Endorsed: App. No. 6310. In the Supreme Court of Texas. Galveston, Harrisburg & San Antonio Railway Company, Plaintiff in Error versus L. V. Wallace, Defendant in Error. Petition for Writ of Error to the Fourth Supreme Judicial District of Texas. By Baker, Botts, Parker & Garwood, W. B. Teagarden and G. B. Fenley, Attorneys. Filed in the Court of Civil Appeals at San Antonio, Texas, Apr. 22, 1909. Jos. Murray, Clerk. Filed in Supreme Court Apr. 24, 1909. F. T. Connerly, Clerk. Refused.

123 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing Fifty-eight pages contain a true and correct copy of the original Petition for Writ of Error, in App. No. 6310, Galveston, Harrisburg & San Antonio Railway Company, Plaintiff in Error—vs.—L. V. Wallace, Defendant in Error, now on file in this office.

I further certify that said application for writ of error was refused by the Supreme Court of Texas on the 28th day of April, 1909.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 7th day of July A. D. 1909.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

124 *Copy of Judgment in Supreme Court.*

(Filed May 29th, 1909.)

In Supreme Court of Texas, from Uvalde County, 4th District.

G., H. & S. A. Ry. Co.
vs.
L. V. Wallace.

April 28th, 1909.

This day came on to be heard the application of G., H. & S. A. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused; that the applicant Galveston, Harrisburg & San Antonio Railway Company and its surety The United States Fidelity and Guaranty Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court this the 28th day of May, A. D. 1909.

Mo. for rehearing overruled May 26, 1909.

[seal.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

(Endorsed:) Application No. 6310. G., H. & S. A. Ry. Co. vs. L. V. Wallace. Copy of Judgment in Supreme Court. Application for Writ of Error refused. Filed in the Court of Civil Appeals at San Antonio, Texas, May 29th, 1909. Jos. Murray, Clerk.

Application for Writ of Error to the Supreme Court of the United States.

125 In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, Sitting at the City of San Antonio, Texas.

No. 4126.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, Appellant,

vs.

L. V. WALLACE, Appellee.

To any Justice of the Supreme Court of the United States or the Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas:

Now come the Galveston, Harrisburg and San Antonio Railway Company, and the United States Fidelity and Guaranty Company, in the above cause, by their attorneys, and present this their petition for the writ of error from the Supreme Court of the United States to be directed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas in the above styled cause, and would respectfully represent, that on the 24th day of February, 1909, in the above styled cause, No. 4126, wherein the Galveston, Harrisburg and San Antonio Railway Company and none other was appellant, and the United States Fidelity and Guaranty Company was its surety on the supersedeas appeal bond, and L. V. Wallace and none other was appellee, which cause was pending on appeal from the County Court of Uvalde County, Texas,—a judgment was rendered and entered against the petitioners, and in favor of said appellee, L. V. Wallace, by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas; that on March 10th, 1909, appellant, in said cause, Galveston, Harrisburg and San Antonio Railway Company, filed in said Court of Civil Appeals its motion for rehearing, which motion was on March 24th, 1909, in all things over-

126 ruled; whereupon, within the time allowed by law, appellant filed its petition for writ of error to the Supreme Court of the State of Texas, which petition was by said Supreme Court denied on April 28th, 1909, and appellant's motion for rehearing in said Supreme Court, which was promptly filed, was by said Court overruled on the 26th day of May, 1909, whereby under the law of the State of Texas the said judgment on May 26th, 1909, became and now is a final judgment against petitioners and in favor of said L. V. Wallace; that the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, because of the refusal by said Supreme Court of Texas to grant the writ of error and review said cause, is, under the laws of Texas, the highest court in the State in which a decision in said cause could be had, and said Court is the lawful custodian of, and has now the possession of, all the records and papers in this cause.

Petitioners further show that in the said judgment of said Court of Civil Appeals, as well as the judgment and proceedings theretofore had in the trial court, there was manifest error to petitioners' prejudice, and of which they are aggrieved, as will hereinafter more fully appear; and petitioners respectfully represent that from the time of joining issue in this cause in the trial court there was drawn in question by appellant the validity of a statute of the United States upon which appellee's cause of action was based, viz: That portion of Section 20 of the act of 1887 as amended by the act of Congress of June 29th, 1906, which reads as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt,
rule or regulation shall exempt such common carrier, rail-
127 road, or transportation company from the liability hereby imposed," appellant's contention being, in substance, that said part of said law, and the authority exercised thereunder, violates the Constitution of the United States and of the State of Texas, and the decision of said trial court and said Court of Civil Appeals were in favor of the validity of said statute and against the contentions and claims of appellant; and there was drawn in question by appellant the jurisdiction of the trial court and the State courts to try causes of action created by and arising out of said act of Congress, appellant objecting to the jurisdiction of the trial court for the reason that by the terms of Section 9 of the act of Congress to Regulate Commerce, approved February 4th, 1887, the Inter-state Commerce Commission and the Federal Courts are given exclusive jurisdiction to try cases of this character, all of which claims so presented by appellant, were decided by the trial court and said Court of Civil Appeals against it.

And your petitioners represent that titles, rights, privileges and immunities under the Constitution and statutes of the United States were, as aforesaid, claimed by petitioners in said suit, and the decision in said suit, both in the trial court and said Court of Civil Appeals, was against such titles, rights, privileges and immunities so claimed and asserted by petitioners, and this will more fully appear in the general demurrer contained in the first paragraph of the answer, which was overruled by the trial court, and in the special answer filed and urged by appellant in said trial court, (which was, upon appellee's exception, excluded by the trial court), in the trial court's charge, and will also appear in the first, second, third, fourth and fifth specifications of error assigned in the said Court of Civil Appeals, and the several propositions stated thereunder, all of which your petitioners respectfully refer to as a part hereof. Objections to said statute were made, and claims to said titles, rights, privileges and immunities arose and were disposed of substantially as follows: Appellee's cause of action was filed in the County Court of Uvalde

County, Texas, for the sum of $43[illegible]20, the alleged value of certain mohair delivered to appellant, Galveston, Harrisburg and
128 San Antonio Railway Company, at Uvalde, Texas, for transportation, consigned to Lowell, Massachusetts, which mohair was alleged to have been lost in transit. Appellant in addition to general demurrer and general denial asserted, by special answer, in substance, that it accepted the property under a written contract, whereby it was, in effect, agreed that it would carry the property to the end of its own line at Galveston, Texas, only, and there deliver same to its next connecting carrier, after which its duty and liability should entirely cease, which contract it asserted was fully complied with. Appellant also asserted in its special answer that the act of Congress of June 29th, 1906, upon which the cause of action is based, is violative of the 5th and 14th Amendments to the Constitution of the United States and the Constitution of the State of Texas, in that its effect is to take the property of appellant without compensation, and without due process of law, and to discriminate against it and deny it the equal protection of the law. Appellant asserted, also, that said act is an invasion of the legislative prerogative of the several states, and is therefore in violation of Articles 9 and 10 of the Federal Constitution. Appellant also asserted that the Interstate Commerce Commission and the Federal Courts alone have jurisdiction of the subject matter of the controversy, and the trial court was therefore without jurisdiction of the case.

Appellant's general demurrer to appellee's petition was overruled by the trial court.

Appellee excepted to appellant's said special answer for the specific reason that the contract set up therein contravened said act of Congress of June 29th, 1906, and was therefore void, and that compliance therewith was, because of the provisions of said act, no defense; which exception was sustained by the trial court and the entire special answer was excluded. The court excluded testimony offered by appellant showing, without doubt, the existence of the contract as charged in the special answer, and full compliance therewith,
129 and charged the jury, in effect, that if the property was delivered to appellant as charged in appellee's petition, appellant was, irrespective of any contract to the contrary, bound for its delivery at destination in Lowell, Massachusetts, unless it was lost because of an Act of God or the public enemy. Judgment was for appellee in the trial court for the full value of the property and costs.

Exceptions to all the said rulings of the trial court were properly saved, motion for new trial was duly presented and overruled in the trial court, and upon appeal, which was promptly prosecuted to the said Court of Civil Appeals, where each and all said issues were properly insisted upon, the judgment was in all things affirmed as before shown, and each and all the said rights, privileges and immunities so claimed by appellant, as aforesaid, under the Constitution and laws of the United States, were thereby denied; whereas, had appellant's said contentions been sustained, the judgment must necessarily have been in its favor.

All of which errors so committed against your petitioners are fully

apparent in the record and proceedings of the case now on file in said Court of Civil Appeals, and are specifically complained of in the assignment of errors filed herewith, which your petitioners respectfully request the court to read and take as a part hereof.

Wherefore your petitioners pray that the writ of error be allowed and issued herein to said Court of Civil Appeals for the removal of said cause to the Supreme Court of the United States, that an order be made fixing the amount of supersedeas bond required, and that upon giving such security all further proceedings in said Court of Civil Appeals be suspended; that a transcript of the record, proceedings and papers upon which said judgment and orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of the court in such cases made and provided, to the end that all errors in said cause committed may be reviewed and corrected and speedy
130 justice done to the parties as the law and the facts shall warrant.

BAKER, BOTTS, PARKER & GARWOOD,
G. B. FENLEY,
W. B. TEAGARDEN,
Attorneys for Appellant, the Galveston, Harrisburg and San Antonio Railway Co., and the United States Fidelity & Guaranty Company.

Having received and considered the foregoing petition for writ of error, the same is in all things allowed upon bond being given by the petitioner in the sum of Twelve Hundred Dollars, conditioned, as required by law, and such Bond, when filed and approved, shall operate as a supersedeas and as a bond for costs and damages, as provided by law. This the 25 day of June, 1909.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

In the foregoing order we each of us concur.

____ ____,
____ ____,
Associate Justices Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

(Endorsed:) Galveston, Harrisburg & San Antonio Ry. Co. et al., vs. L. V. Wallace. Application for Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 25th, 1909. Jos. Murray, Clerk.

131 *Appeal Bond.*

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at the City of San Antonio, Texas, in Term Time, — Day of ——, 1909.

No. 4126.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
L. V. WALLACE, Appellee.

Know all men by these presents; that, whereas in the County Court of Uvalde County, Texas, in a certain suit therein pending, wherein L. V. Wallace, appellee, was plaintiff, and the Galveston, Harrisburg and San Antonio Railway Company, appellant, was the defendant, a judgment was rendered against said appellant for the sum of $414.92, besides all costs of suit, from which judgment said appellant perfected its appeal in due time to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, with the United States Fidelity and Guaranty Company, as the surety on the appeal bond, in which court, upon said appeal, said judgment was affirmed and judgment was in said cause entered and recorded against appellant and its said surety on said appeal bond and in favor of said appellee on the 24th day of February, 1909, for the said sum and all costs, and,

Whereas, said appellant's motion for rehearing having been overruled, application was made by it to the Supreme Court of the State of Texas for a writ of error to said Supreme Court, which petition was, on the 26th day of May, 1909, overruled and denied by said Supreme Court of the State of Texas; and,

Whereas, the said Galveston, Harrisburg and San Antonio Railway Company, appellant, and the said United States Fidelity
132 and Guaranty Company have filed their petition for writ of error from the decision and judgment of said Court of Civil Appeals so rendered as aforesaid, to the Supreme Court of the United States, and having filed their assignment of errors herein in due time, they desire to suspend all further proceedings in said Court of Civil Appeals until the final determination of said writ of error by the Supreme Court of the United States; and,

Whereas, the said petition has been allowed, and the amount of bond which they are required to enter into for said purpose has been fixed at the sum of Twelve Hundred ($1200.00) Dollars;

Now, therefore, we, the said Galveston, Harrisburg and San Antonio Railway Company, and the said United States Fidelity and Guaranty Company as principals, and Southern Surety Company and —— —— as sureties, hereby acknowledge ourselves to be jointly and severally firmly bound unto the said L. V. Wallace in the full and just sum of Twelve Hundred ($1200.00) Dollars, to be paid

to the said L. V. Wallace, his certain attorneys, executors, administrators, or assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. The condition of the above obligation is such, however, that if the said Galveston, Harrisburg and San Antonio Railway Company and the said United States Fidelity and Guaranty Company shall prosecute their writ of error to effect, and shall answer all the damages and costs that may be awarded against them, if they shall fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof, witness our signatures this the 25th day of June, 1909.

GALVESTON, HARRISBURG AND SAN ANTONIO RY. CO. AND THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Principals,*
By Their Attorney, W. B. TEAGARDEN.
SOUTHERN SURETY CO., *Surety,*
133 By C. S. COBB, *President.*

Attest:
E. G. DAVIS, *Sec'ty.* [SEAL.]

The within and foregoing bond is hereby approved, as to form, amount and sufficiency of sureties, this the 3rd day of July, 1909.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

(Endorsed:) Galveston, Harrisburg & San Antonio Ry. Co. vs. L. V. Wallace. Appeal Bond. Filed in the Court of Civil Appeals, at San Antonio, Texas, July 3rd, 1909. Jos. Murray, Clerk.

134 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, holding sessions at San Antonio, Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sitting at the City of San Antonio, before you, or some of you, being the highest court of said State in which a decision could be had in the said suit between L. V. Wallace, appellee, and The Galveston, Harrisburg and San Antonio Railway Company, appellant, and The United States Fidelity and Guaranty Company, its surety, being numbered 4126 on the docket of said Court of Civil Appeals, wherein was drawn *the* question *of* the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity,

or wherein was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or wherein a title, right, privilege or immunity was claimed under the Constitution or a treaty, or statute of, or commission held or authority exercised under The United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of The Galveston, Harrisburg and San Antonio Railway Company and The United States Fidelity and Guaranty Company, as by their complaint appears, we
135 being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal distinctly and openly you send the records and proceedings with all things concerning the same to the Supreme Court of The United States together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of The United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 3rd day of July, in the year of our Lord, One Thousand, Nine Hundred and Nine.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk of the Circuit Court of the United States,
Western District of Texas.
By A. J. CAMPBELL, *Deputy.*

Allowed:
JOHN H. JAMES,
Chief Justice of the Court of
Civil Appeals for the Fourth
Supreme Judicial District of Texas.

135½ [Endorsed:] Galveston, Harrisburg & San Antonio Ry. Co. et al., vs. L. V. Wallace. Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Jul- 3, 1909. Jos. Murray, Clerk.

136 THE UNITED STATES OF AMERICA, *ss:*

To L. V. Wallace, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of The United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, wherein The Galveston, Harrisburg and

San Antonio Railway Company and The United States Fidelity and Guaranty Company are plaintiffs in error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 3d day of July, in the year of our Lord, One Thousand, Nine Hundred and Nine.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Attest with the seal of United States Circuit Court for the Western District of Texas, this the 3rd day of July, 1909.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas,
By A. J. CAMPBELL, *Deputy.*

137 Due service of the above and foregoing citation is hereby acknowledged, this 5th day of July, 1909.

L. V. WALLACE,
By MARTIN, OLD & MARTIN,
Att'ys of Record of said L. V. Wallace.

137½ [Endorsed:] Galveston, Harrisburg and San Antonio Ry. Co. et al. Plaintiff in Error vs. L. V. Wallace, Defendant in Error. Citation in Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Jul- 9, 1909. Jos. Murray, Clerk.

138 *Assignment of Errors.*

In the Court of Civil Appeals, Fourth District of Texas, Sitting in the City of San Antonio, Texas.

No. 4126.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
L. V. WALLACE, Appellee.

Comes now the Galveston, Harrisburg and San Antonio Railway Company, Appellant, and the United States Fidelity and Guaranty Company, and file this their Assignment of Errors, upon which they will rely in the prosecution of the Writ of Error before the United

States Supreme Court in this cause, and for such specification of errors, they say:

First. Appellant's general demurrer to plaintiff's petition was well taken, and the trial court erred in overruling it, because of action being, without doubt, based upon Section 20 of the act of Congress approved February 4th, 1887, as amended by the act of June 29th, 1906, the court was without jurisdiction of the subject matter of the controversy, jurisdiction over such causes of action being, by Section 9 of said law, lodged with the Interstate Commerce Commission and the Federal Courts exclusively, and the Court of Civil Appeals committed error in refusing to reverse and dismiss this cause on this ground.

Second. The trial court erred in overruling appellant's general demurrer to the petition, and the Court of Civil Appeals erred in sustaining that action, because the petition states no cause of action except under the act of June 29th, 1906, which act is itself in violation of the 5th and 14th Amendments of the Constitu-
139 tion of the United States, in this:

(*a*) In practical effect it takes the property of appellant for a private purpose, without compensation and without just cause and without due process of law.

(*b*) It is an arbitrary, capricious discrimination against appellant, and those similarly situated, and denies them the equal protection of the law.

(*c*) It is not an exercise of the authority conferred by the Federal Constitution upon Congress to regulate commerce among the states, but exceeds the authority of Congress and invades the reserved rights of the several states in violation of Articles 9 and 10 of the Federal Constitution.

Third. The trial court erred in striking out appellant's special answer upon appellee's exception thereto, and the Court of Civil Appeals erred in sustaining this action, because in so doing appellant was denied an ample and valid defense based upon a lawful contract made, and fully complied with, in good faith, which contract and defense was held to be bad because in contravention of the said Act of Congress of June 29th, 1906, which act and the said action of said courts in enforcing it violates the 5th Amendment to the Constitution of the United States, in that the effect of it all is to take appellant's property for a private purpose, without wrong or fault upon its part, without compensation, and without due process of law.

Fourth. The said conduct of said trial court in excluding said answer was error, and said Court of Civil Appeals erred in sustaining said action, thereby denying appellant the right to urge as a defense to the action its said contract and compliance therewith, and erred in enforcing said act of Congress of June 29th, 1906, against appellant in this case, because said law, and the action of the courts in enforcing it, violate the 14th Amendment to the Constitution of the United States in that appellant and those similarly situated are
140 denied the free right to contract, to own, manage, and enjoy their property and conduct their business as other persons and corporations and common carriers may do, and particularly

as to common carriers engaged in transportation of interstate commerce exclusively by water; and it discriminates against those who patronize such carriers. Said act is, therefore, an arbitrary and capricious classification and denies appellant and others the equal protection of the law.

Fifth. The trial court erred in striking out appellant's said defenses set up in its special answer, and in enforcing said act of Congress of June 29th, 1906, against appellant, and the Court of Civil Appeals erred in approving of this action, because said act is not within the purview of the authority conferred upon Congress by the Federal Constitution to regulate commerce among the states, but it exceeds that authority and invades the reserved legislative rights of the states and the people, and therefore violates Articles 9 and 10 of the Federal Constitution.

Sixth. The trial court erred in giving in charge to the jury the second paragraph of the general charge, and the Court of Civil Appeals erred in approving same by affirming the judgment, which charge reads as follows:

You are further instructed by the court that if you believe, from a preponderance of the evidence in this case, that the plaintiff L. V. Wallace is the successor of the firm of Barnes, Wallace & Co., and as such successor, if you find he is such successor, is the owner of the assets of said late firm, and particularly of the claim, if any, involved in this suit; and if you further believe from a preponderance of the evidence in this case that said Barnes, Wallace & Co., on October 10th, 1906, and October 23rd, 1906, and November 14th, 1906, delivered the mohair alleged by plaintiff to have been so delivered on said respective dates, and further find that said mohair, if any, was received by the defendant, at Uvalde, Texas, and shipped and billed by defendant from Uvalde, Texas, to the Massachusetts Mohair Plush Co. at Lowell, Mass.; and if you further find that all or any part of such mohair, if any, never reached Lowell,
141 Mass., or was never delivered to said Massachusetts Mohair Plush Co., then, if you so find, you will find for the plaintiff.

This was error because it applied and enforced the act of Congress of June 29th, 1906, and thereby compelled appellant to reimburse appellee for the wrong and default of an entire stranger over whom appellant had no control, thus taking its property for a private purpose without just cause and without compensation and without due process of law in violation of the 5th Amendment to the Constitution of the United States.

Seventh. The trial court erred in giving to the jury the charge set out in the next preceding specification of error, and in enforcing the said act of Congress of June 29th, 1906, against appellant, and the Court of Civil Appeals by affirming the judgment erred in approving said action, because said law and its enforcement is in effect an arbitrary and capricious classification as against appellant and others similarly situated, in that, it is thereby denied appellant the right to contract and to operate and manage its business and have and enjoy property, as other persons and common carriers may do, and particularly as common carriers exclusively by water may do,

and it discriminates against the patrons of common carriers exclusively by water, and denies appellant and others similarly situated, and those who patronize carriers exclusively by water the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

Eighth. The trial court erred in submitting to the jury the said charge set out in the sixth specification of error, and in enforcing against appellant the law enacted by Congress of the United States, approved June 29th, 1906, and the Court of Civil Appeals erred in approving such action by affirming the judgment of said court, because the said act of Congress is not within the purview of the authority granted by the Federal Constitution to Congress to regulate commerce among the states, but exceeds that authority and invades the reserved rights and powers of the states, and therefore violates Articles 9 and 10 of the Federal Constitution.

142 Ninth. The trial court erred in giving to the jury the first paragraph of the general charge, and in enforcing against appellant the said act of Congress of June 29th, 1906, and the Court of Civil Appeals erred in approving of this conduct by affirming the case. Said charge reads as follows:

"You are instructed by the court that the Galveston, Harrisburg and San Antonio Railway Company, the defendant in this case, is a common carrier, and as such common carrier is liable to any person who delivers freight to it, or its duly authorized agents, for transportation from a point in one State to a point in the same, or any other State, of this Union, said freight being received by said defendant at the one point, and billed by it to the other point, for any damage or loss accruing to said freight, after such receipt, and before delivery to the consignee, at point of destination, provided said damage was not caused by some act of God, or at the hands of a public enemy."

This was error because the effect and result is violative of the 5th and 14th Amendments of the Constitution of the United States, and of Articles 9 and 10 of the Federal constitution, for reasons particularly stated in the sixth, seventh, and eighth specifications of error, where the identical questions are presented, and the same are now referred to and made a part hereof to avoid repetition.

Tenth. The Court of Civil Appeals committed error in construing the act of Congress of June 29th, 1906, to mean that the initial carrier at all events should be liable as at common law for the delivery of interstate shipments at destination, irrespective of any contract limiting liability to its own line and its own fault, but if valid at all it should have been construed to apply only to through shipments where there is an express or implied contract on the part of the initial carrier to carry to destination.

Wherefore plaintiffs in error pray that said cause be reviewed, and that the judgment of affirmance of this cause made and entered in said Court of Civil Appeals be set aside, and that judgment

143 reversing and dismissing this cause, and that all costs of all courts be adjudged against defendant in error.

If, however, they be not entitled to such disposition of the case, then they pray that the cause be reversed and remanded, and that

such other and further orders and decrees be entered herein for the settlement and protection of the rights of plaintiffs in error as the law and the facts shall warrant, and duty bound they will ever pray, &c.

BAKER, BOTTS, PARKER & GARWOOD,
W. B. TEAGARDEN AND
G. B. FENLEY,
Attorneys for Galveston, Harrisburg & San Antonio Railway Co., Appellant, and The United States Fidelity & Guaranty Co.

(Endorsed:) Galveston, Harrisburg & San Antonio Ry. Co., et al., vs. L. V. Wallace. Assignment of Errors. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 25th, 1909. Jos. Murray, Clerk.

Cost Bill in Court of Civil Appeals, San Antonio, Texas.

From Uvalde County.

No. 4126.

G., H. & S. A. Ry. Co., Appellant,
vs.
L. V. WALLACE, Appellee.

Record Filed Jan'y 12, 1909.
How Decided: Affirmed.
Names of Principals: Galveston, Harrisburg & San Antonio Railway Company.
Names of Sureties: United States Fidelity & Guaranty Co.
Disposed of M'ch 24, 1909.
Opinion by Fly, A. J.

Filing Record	$ .50
Docketing Cause	.50
Appearances	1.00
Filing Briefs and other Papers	3.10
Notices	6.00
Orders	2.00
Judgment	1.00
Recording Opinion	.70
Certificate with Seal	.50
Taxing Cost	.50

144 Cost Bill (Continued).

Certified Copy Bill of Costs	1.00
Mandate	1.50
Filing and Docketing Motion	.35
Precept	1.00

Making Certified Copy of Motion	4.75
Sheriff's Fees	1.00
Transcript to Supreme Court United States	72.00
Transcript to Supreme Court	1.50
Express Charges to and from Supreme Court	.60
Costs in Supreme Court & Copy of application	31.25
Total	$130.75

I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs, for the sum of One hundred thirty & —— 75/100 Dollars is true and correct.

Given under my hand and seal of office, this 10 day of July, 1909

[SEAL.] JOS. MURRAY, *Clerk.*

145 Clerk's Office, Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

I, Joseph Murray, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, hereby certify that the foregoing One hundred — forty four pages, except pages 134 & 136, contain a true and correct copy of the transcript of the record of all the proceedings had in the County Court of Uvalde County, Texas, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas and in the Supreme Court of Texas, as the same appear of record and on file in this office in cause No. 4126 entitled, The Galveston, Harrisburg and San Antonio Railway Company, Plaintiff in Error, vs. L. V. Wallace, Defendant in Error.

I further certify that the pages herein numbered 134 & 136 is the original writ of error, of which a copy has been lodged and is now on file in this office; and that the pages herein numbered 136 is the original citation in error, a copy of which is now on file in this office.

In testimony whereof, I have hereto signed my name and affixed the seal of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, done at the city of San Antonio, this the 12 day of July, A. D. 1909.

[Seal Court of Civil Appeals of the State of Texas.]

JOE MURRAY,
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 21,775. Texas, 4th Supreme Judicial District, Court of Civil Appeals. Term No. 549. The Galveston, Harrisburg & San Antonio Railway Company and The United States Fidelity & Guaranty Company, plaintiffs in error, vs. L. V. Wallace. Filed July 28th, 1909. File No. 21,775.

No. 548.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiffs in Error,

vs.

L. V. WALLACE,

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

THE ANSTON PRINTING COMPANY, AUSTIN, TEXAS.

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, AND THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiffs in Error, AGAINST L. V. WALLACE.	No. 549.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the Circuit Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Statement of Facts.

The action was brought in the County Court, Uvalde County, Texas. The plaintiff, L. V. Wallace, by his amended original petition, charged that he was the successor of the firm of Barnes Wallace & Co., and the sole owner of all the

claims and assets of that firm and of the claim sued upon. He alleged as a cause of action that the defendant in consideration of charges paid, received from the firm of Barnes Wallace & Co. for delivery to the Massachusetts Mohair Plush Company at Lowell, Mass., the mohair described in the petition, which was of the reasonable market value at Lowell of the sum of $436.20, and that the defendant agreed and contracted to deliver the mohair at Lowell, Mass. The petition alleges that certain of the mohair was lost in transit. The seventh allegation of the petition is as follows:

> "The plaintiff alleges that the defendant did not safely carry and deliver the said mohair in accordance with its contract and duty under the law, but on the contrary, so negligently conducted it—said shipments—that the mohair above stated never reached its destination, but was lost or stolen in transit between Uvalde, Texas, and Lowell, Massachusetts, to the plaintiff's damage in the sum of $436.20."

The defendant filed a demurrer to the sufficiency of the petition (p. 3), and also excepted to it upon various grounds (p. 3), and the defendant then filed an answer in which, among other things, it alleged that the mohair was accepted and transported by defendant under written contracts, which contained the express provision that the defendant was not to be liable for loss or damage for the mohair except while in its charge, and that upon delivery to the next succeeding carrier it should be absolved, and that it had complied with the stipulations.

The plaintiff filed a supplemental petition in which, among other things, the plaintiff excepted to the defense as set up

> "on the ground that it is no defense under the law—the Act of Congress called the Railroad Rate Bill which became a law in August, 1906, under which each receiving carrier is liable for frieight lost and may recover from his connecting carrier or the carrier who lost the goods." (P. 6.)

The Court overruled the general demurrer and the defendant's special exceptions and struck out the special answer which the defendant excepted. (P. 6.) The case then came on for trial. The plaintiff offered in evidencc a part of the bills of lading set out at page 8, but the bills of lading contained stipulations not offered by the plaintiff but subsequently offered by the defendant and excluded by the Court. (P. 8 and p. 9 at the foot.) The plaintiff offered evidence to show that the goods had not been received by the Massachusetts Mohair Plush Company at Lowell.

The case was submitted to the jury upon a charge in which they were instructed that the defendant is a common carrier and

> "is liable to any person who delivers freight to it or its duly authorized agents for transportation from a point in one State to a point in the same or any other State of this Union, said freight being received by said defendant at the one point and billed by it to the other point, for any damage or loss accruing to said freight after such

> receipt, and before delivery to the consignor to point of destination; Provided, said damage was not caused by some act of God or at the hands of a public enemy."

The jury were further instructed that if the plaintiff delivered the mohair to the defendant, and it was received and shipped and billed by the defendant to the Massachusetts Mohair Plush Company at Lowell, Massachusetts, and never reached Lowell or was never delivered to the Massachusetts Mohair Plush Company, they should find for the plaintiff. They were also instructed that the measure of damage was the market value of the goods at Lowell at the time and in the condition they should have arrived there. (P. 17.)

There was a verdict and judgment for plaintiff. (P. 17.)

A motion for a new trial for error in overruling the demurrer and the exceptions to the plaintiff's petition and in sustaining the plaintiff's exceptions to the defendant's special answer and striking it out and also upon the ground

> "that the Court erred in refusing to allow defendant to offer in evidence all the stipulations of the contract not offered by plaintiff.
>
> SEVENTH: The Court erred in refusing to allow defendant to offer in evidence that special stipulation in the contract releasing it from loss of or damage to the mohair after delivery to its connecting carrier.
>
> EIGHTH: The Court erred in charging the jury in effect that defendant, upon proof that

> the mohair was delivered to it for transportation, as charged by plaintiff, would be liable to plaintiff for the value thereof absolutely if it was not delivered to consignee, that is, if it was lost."

A motion for a new trial was also made upon the ground that

> "it was not shown by any competent evidence where or by whom the mohair was lost, if lost at all; and it is not shown that this defendant was guilty of any fault or wrong. On the contrary, the mohair was delivered by it to its connecting carrier and was given by it to the next carrier and so on until it passed into the hands of the last carrier." (Fols. 27–28.)

The defendant filed bills of exception.

The first exception was to the exclusion of certain stipulations in the bill of lading, to wit:

> "It is understood and expressly stipulated that the liability of the Galveston, Harrisburg & San Antonio Railway Company shall cease upon delivery to its next connecting line of the goods, merchandise and produce mentioned herein.
>
> It is also further stipulated and agreed that in the event the articles therein mentioned being conveyed by water transportation *en route* to destination they should be subject to all customary conditions of the same and the dangers of navigation, perils of the sea and loss or damage by fire or water are excepted from carrier's liability—neither this company nor any of its connections or transfer lines which receive and transports said property will be responsible

for damage nor for loss or damage caused by fire or any cause whatever not due to the company's negligence, all of which is made a part of the terms and conditions of this bill of lading.

Which testimony was objected to by plaintiff because it is immaterial and irrelevant; and because the defendant having received the mohair for transportation as shown by the contract, it became liable absolutely for failure to deliver at destination, and it could not under the law limit its liability as in that part of the contract it attempted to do, and the stipulations, being in contravention of the Act of Congress of the United States of June, 1906, and against public policy, are void.

Which objections were sustained by the Court and the testimony was excluded for the reasons stated in the objections, to which ruling of the Court the defendant then and there promptly excepted." (Fols. 29 and 30.)

The same exception was taken in a slightly different form as Bill of Exception No. 2. (P. 21.) An appeal was taken to the Court of Civil Appeals where the judgment was affirmed. (P. 38.) A writ of error was applied for in the Supreme Court in the State of Texas which was refused (p. 83) and thereupon a writ of error was taken to this Court.

The assignment of errors is set out at pages 91, 92, 93 and 94 of the record.

The assignment of errors presents the questions argued in the accompanying brief in No. 550, *Galveston*,

etc., Railway Company v. *Crow.* The tenth assignment of error reads as follows:

> "The Court of Civil Appeals committed error in construing the Act of Congress of June 29, 1906, to mean that the initial carrier at all events should be liable as at common law for the delivery of Interstate shipments at destination, irrespective of any contract limiting liability to its own line or its own fault, but if valid at all, it should have been construed to apply only to through shipments where there is an express or implied contract on the part of the initial carrier to carry to destination." (Fol. 142.)

The errors upon which the plaintiff in error relies in this Court are :

(1) That the Court below held that the effect of the Statute of June 29, 1906 (the Carmack Amendment), was to render the railroad company the insurer of the safe delivery of the goods at destination, whereas the true construction of that Statute is that it was intended to create a liability on the part of the initial carrier for any loss, damage or injury caused by it or by a connecting carrier, of goods received for transportation beyond a State line.

(2) That the Courts below erred in excluding the stipulation of the contract releasing the railroad company from liability for acts not caused by its own negligence or the negligence of a connecting carrier, because the true construction of the Act of June 29, 1906, does not prevent the initial carrier from stipulating against loss, damage or injury resulting from an act not caused by it or by a connecting carrier.

(3) That the Courts below erred in enforcing the Statute of June 29, 1906, because the same is unconstitutional and void as construed to make the initial carrier liable for a loss, damage or injury caused by a connecting carrier or by a third person, although such connecting carrier or third person is not its agent or in any wise connected with it.

(4) That the Courts below erred in enforcing the Act of June 29, 1906, because the same is unconstitutional and void inasmuch as the remedy attempted to be given by it to the initial carrier in case of the payment of a loss by it occurring upon the line of a connecting carrier is void and of no effect and the provision for such remedy being an essential part of the general scheme of relief under the Statute, the entire Statute fails.

(5) That the Courts below erred in enforcing the Statute, because the courts had no jurisdiction of the subject matter, the jurisdiction of the Federal Courts and of the Interstate Commerce Commission being exclusive.

Each of these grounds of error is argued at length in the brief submitted in No. 550, the *Galveston, etc., Railway Company* v. *Crow*, and upon the arguments submitted in the brief in that case, the plaintiff in error submits this case.

MAXWELL EVARTS,
JAMES L. BISHOP,
Counsel for Plaintiff in Error.

[2988K]

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1910

No. [redacted] 1109

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

J. D. CROW.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 28, 1909.

(21,776.)

(21,776)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 550.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

J. D. CROW.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 16, 1909.

1 THE STATE OF TEXAS,
County of Uvalde:

At a term of the County Court, begun and held within and for the County of Uvalde, at Uvalde, Texas, on the 14th day of September, A. D. 1908, and which adjourned on the 26th day of September, A. D. 1908, the Honorable W. D. Love, Judge thereof, presiding, the following cause came on for trial, to-wit:

No. 460.

J. D. CROW, Plaintiff,
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO., Defendant.

2 *Plaintiff's Original Petition.* (*Filed* 3/26/08.)

In the County Court, Uvalde County, Texas, June Term, A. D. 1908.

THE STATE OF TEXAS,
County of Uvalde:

To the Honorable W. D. Love, Judge of said Court:

Your petitioner, J. D. Crow, hereinafter styled plaintiff, complaining of The Galveston, Harrisburg and San Antonio Railway Company, defendant, respectfuly shows to the Court:

That plaintiff is a resident of Uvalde County, Texas, and that defendant is a railway corporation, duly incorporated under the laws of the State of Texas, and has a line of railroad passing through Uvalde County, and has an agent at the Station of Uvalde, Uvalde County, Texas, upon whom service may be had in this case.

For a cause of action, plaintiff alleges as follows, to wit:

1st. That on or about the 12th day of March, A. D. 1907, plaintiff was owner of and in possession of 3½ bags of mohair of the total weight of 787 pounds at Uvalde, Texas, which he desired to ship to the Massachusetts Mohair Plush Company at Lowell, Massachusetts. And on or about the said date, plaintiff made and entered into a contract with the defendant by the terms of which defendant agree and undertook to transport said mohair from Uvalde, Texas, over its own line to Galveston, Texas, and forward the same thence over its connecting lines to Lowell, Mass., for delivery, the said mohair in good condition to the said Massachusetts Mohair Plush Company, at said Lowell, Mass., and the plaintiff then and there delivered to the defendant, the said 3½ bags of mohair as aforesaid.

2nd. Plaintiff says that in violation of the terms of its contract as aforesaid, defendant has wholly failed and neglected to deliver to the said Massachusetts Mohair Plush Company at Lowell,
3 Mass., the said three and one half bags of mohair as above set forth, or any part thereof to plaintiff's damage.

3rd. Plaintiff says that had the said 3½ bags of mohair been forwarded with reasonable dispatch, and had been delivered to the Massachusetts Mohair Plush Company at Lowell, Mass., within a reasonable time from the date on which the said shipment was made, it would reasonably have been worth on the market at Lowell, Mass., the net sum of 30 cents per pound, making a total of $236.10, which this plaintiff has been damaged by reason of the failure of the defendant to deliver said mohair as aforesaid.

4th. Plaintiff says that he has been out of the use of his money from the date above mentioned, and has been further damaged in the sum of the legal interest on said amount from the said date.

Wherefore, premises considered, plaintiff prays that defendants be cited to answer this petition, and that on final hearing hereof, he have his judgment for the said sum of $236.10, and that he have judgment for the further sum of legal interest on same from the 12th day of March, A. D. 1907, and for all costs in this behalf expended, and for such other and further relief to which he may be in law and equity entitled.

T M. MILAM,
Attorney for Plaintiff.

Filed March 26, 1908.

First Amended Ans. (*Filed* 9/22/08.)

Pending in County Court Uvalde County, Texas, September Term, 1908.

J. D. CROW
vs.
G., H. & S. A. RY CO.

Now comes defendant and leave of the Court first had amends its original answer filed herein on the 17th day of June 1908 and for amendment says it demurs to plaintiff's petition and says the same is insufficient in law to entitle him to recover and it states no cause of action against defendant and of this it prays judgment.

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W. B. TEAGARDEN &
G. B. FENLEY,
Att'ys for Def't.

And excepting specially to plaintiff's petition defendant says that the same is insufficient in law for want of particulars to show when, where and on what line of roads or by what carriers his mohair was routed and carried and for want of particulars to show which of the carriers, if either, was at fault.

W. B. TEAGARDEN &
G. B. FENLEY,
Att'ys for Defendant.

And for answer in this behalf if answer be required defendant denies all and singular the allegations contained in plaintiff's peti-

tion and says the same are not true and of this it puts itself upon the country.

And for special answer to plaintiff's cause of action, if answer be required, defendant says that at the time of the shipment of the mohair in question a contract in writing for the transportation of the same was entered into by and between the parties governing the transportation of said mohair which contract was signed and properly executed by plaintiff or an agent for him who was thereunto duly authorized a substantially true copy of which is as follows:

UVALDE, TEXAS, *March* 12, 1907.

The Galveston, Harrisburg & San Antonio Ry. Co. hereby acknowledge receipt from Mr. Crowe (Consignor) the packages named below (contents and value unknown) in apparent good order, marked and numbered as per margin, for transportation from the station first above written to Lowell, Mass. And the Galveston, Harrisburg & San Antonio Ry. Co. agrees to transport same from the station first above written to Galveston and there deliver in like good order to Mass. Mohair Plush Co. (Consignee), or his assigns, provided destination is on this Company's line, but if final destination is beyond this Company's line, then this Company agrees to deliver said shipment in like good order to its next connecting carrier for consignee's account; in either event, consignee agreeing to pay freight and charges as per margin.

Said articles are accepted for transporation upon the following terms and conditions, which are expressly agreed to by the shipper:

1. It is expressly stipulated as a condition precedent to the issuance of this through bill of lading and guarantee of through rate that the liability of the said Galveston, Harrisburg & San Antonio Railway Company is limited to its own line, and shall cease and determine upon delivery to a connecting common carrier of the articles herein mentioned. And in case of loss, damages or injury to any of said articles, that carrier alone shall be liable in whose (actual) custody said articles were at the time of such loss, damage or injury; but delivery by any carrier hereunder to its next connecting carrier shall be complete when the property is placed at customary point of transfer and notice thereof given to such connecting carrier.

2. Neither this Company nor any connecting line which may receive said articles for transportation shall be liable for loss or damage by wet, dirt, decay, bursting or breaking of baggage, ties or other packages or receptacles in which the said articles may be packed, or on account of improper, imperfect or insufficient packing or preparation for shipment.

3. It is agreed that no carrier accepting for transportation the articles mentioned herein shall be responsible for the leakage of liquors or liquids of any kind, breakage or queensware, hollow ware, looking glasses, machinery, musical instruments of any kind, picture frames, the breaking of eggs, or the decay of any perishable articles, or deterioration or destruction of any article by its inherent qualities or the condition in which received, or decay or damage to such articles as may decrease in value by the delay incident to

transportation, or loss of weight of coffee or grain in bags or rice in tierces, or damage arising from the effects of heat and cold, or loss or injury to nuts in bags or lemons or oranges in boxes not
6 covered with canvas; nor for the loss of damage to hay, hemp, cotton or any article, the bulk of which renders it necessary to transport the same in open cars; provided that this stipulation shall not be construed as exempting any carrier from liability for negligence on the part of its agents or servants.

4. No carrier accepting the said articles for transportation shall be liable for damage to, or loss or destruction of said articles by fire, or for loss, damage or delay caused by unavoidable causes or by quarantine regulations, strikes, riots, stoppage of labor, highway robbery, wrecking of trains, or by collision, or any of the dangers of navigation and perils of the sea while on seas, gulfs, lakes, rivers or canals; provided, that this stipulation shall not exempt any carrier from liability for the negligence of its agents or servants.

5. In case said articles shall be conveyed over any part of the route to destination by water transportation, they shall be subject to all customary conditions of such water transportation. And it is further stipulated that all charges entered on this bill of lading and such as may be necessarily incurred en route are guaranteed by said shipper and the owner of said articles. It is further stipulated that no carrier accepting said articles for transportation shall be responsible for damages for wet or rainfall while upon platform or in transit between the points named in this bill of lading, nor for old or concealed damage, nor for loss or damage caused by delay in transportation, or from any cause whatever not due to the negligence of such carrier.

6. The rate of freight for transportation of the articles named herein from place of shipment to destination is guaranteed not to exceed the rate specified herein and charges added or incurred; provided, that the contents and weight of packages as noted herein are correct. It is, however, further understood and agreed that only approximate weights are signed for and correct weights and classification are to be ascertained and collected at destination; provided, however, it is expressly stipulated and understood that
7 this bill of lading is given subject to correction as to rate, weight and classification so as to conform to the rates, rules and regulations prescribed by the Railroad Commission of Texas; and if destination is beyond the limits of the State of Texas, then subject to correction so as to conform to the rates, rules and regulations established according to the laws relating to interstate commerce.

7. It is expressly stipulated that each package of freight must be plainly marked with the name of consignee and destination, except shipments in carload lots to one consignee, and except cotton, which are provided for by rules governing the same, and no carrier accepting for transportation the articles herein mentioned shall be liable for any loss, delay or damage due to improper marking of packages.

8. It is furthermore hereby expressly stipulated and mutually agreed that no suit or action against this company or any carrier

accepting said articles for transportation for the recovery of any claim arising from the loss or damage to the contents of any package shipped under this bill of lading or for delay in delivering the same shall be sustained in any court of law unless notice of such claim for loss, delay or damage shall be given to such carrier within ninety days after such loss, damage or delay shall occur and no suit or action shall be commenced against this company or any carrier accepting said articles for transportation for the recovery of any claim by virtue of this bill of lading of the transportation of said articles, unless such suit or action shall be commenced within two years next after the loss, damage or delay shall occur, any statute of limitation to the contrary notwithstanding.

9. It is further stipulated that in the event of loss, detriment or damage done to or sustained by the property herein mentioned during transportation from place of shipment to place of destination, that in estimating the amount of loss or damage so occurring, so far as it shall fall on the Galveston, Harrisburg & San Antonio Railway Company, or any carrier accepting said articles for transportation under this bill of lading, the value and price of
8 the articles herein mentioned at the place and time of shipment under this bill of lading shall be taken as the true price and value thereof.

10. It is expressly understood and agreed that this Company reserves the right to forward the property herein mentioned by any line of a common carrier between the point of shipment and destination and by any route it may choose.

11. No carrier hereunder shall be liable in any way for any documents, specie or money, or for any articles of extraordinary value (not specifically rated in the published classifications), unless the names of said articles are specifically mentioned in this bill of lading and a stipulated value of the articles is endorsed hereon.

12. Every carrier accepting said property for transportation hereunder shall have a right to inspect the same, and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped and at the rates and under the rules provided for by published classifications.

13. It is expressly agreed that this bill of lading must be presented without alteration or erasure and surrendered upon demand for the delivery of the articles herein mentioned.

In Witness whereof, I, as agent of the Galveston, Harrisburg & San Antonio Railway Company, have signed Two bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Uvalde this the 12 day of Mch. 1907.

J. W. EVANS,
Agent of the Galveston, Harrisburg & San Antonio Railway Co.

List of Articles: 3½ Bags of Mohair.

Marks, Consignee and Destination: Mass. Mohair Plush Co. Lowell, Mass.

And defendant says that it in all respects complied with said contract and promptly delivered said Mohair in good order
9 and condition to its connecting carrier at Galveston, Texas, the line of Steam Ships known as the Morgan Line a common carrier by steam ship line from Galveston, Texas to New York City in the State of New York which carrier in turn as defendant is informed and believes carried the same safely and promptly and delivered it to the Metropolitan Steam Ship Co. its next connecting carrier on the route to destination & in turn delivered same to the Boston & Maine Rail Road Company to be carried to Lowell, Massachusetts & there delivered to the consignee and defendant says that under and by virtue of its contract it was obligated & in duty bound to carry said Mohair only — its said first connecting carrier and deliver to its which it did in good faith and thereby became relieved of all liability for loss or damage to the Mohair all of which was specially provided for in the contract and defendants says the Mohair was not lost by it or while under its care but after it had delivered the same to its connecting carrier as aforesaid and after it had discharged its whole duty under the contract & by reason thereof it is not liable.

And defendant further says that if the act of Congress of June 1906 or if there be an act of Congress of the United States which authorizes or attempts to authorize the courts of this state under the pleadings and facts in this case to give judgment against this defendant herein, on behalf of plaintiff, for the loss and damage, or any part thereof which was not due to any wrong violation of the contract or negligence on its part, but due to the wrong or default of any other carrier over whose line the shipment was transported, then such law is violative of the Constitution of the United States and of the State of Texas, in that the effect of it is:

1st. To take the property of this defendant without compensation, and without due process of law, and to bestow it upon another without any violation of contract, default or wrong on the part of this defendant of which plaintiffs have any just right to complain.

2nd. To deprive this defendant of the equal protection
10 of the law, in that it denies to it the right of contract, and to have and enjoy the benefits of its contracts such as is accorded to all other classes of persons and corporations engaged in business enterprises; and it is denied thereunder the right to acquire, hold or enjoy property to that full extent enjoyed by other corporations and natural person- engaged in business enterprises in Texas.

3rd. The effect of it is to invade the exclusive domain of the State Legislation and state's rights, and in the guise of regulating interstate commerce to create on behalf of the shipper, a resident of the State of Texas, a penalty, and to levy on his behalf arbitrarily a contribution against the railroads of this state (& in this case against this defendant) conducting their business wholly within the State without any wrong or default whatever upon their part, but wholly and entirely to compensate the shipper for loss or damage done by a stranger to them, and a non-resident over whom the courts of this state have no jurisdiction, and over whom

they have no control or supervision, and with which wrongs and default they, as in this case, had no part or interest either by contract or otherwise, and against whom no remedy or right is guaranteed for reimbursement that can be enforced in the courts of this state.

And defendant says that such contributions so arbitrarily levied and exacted may become so enormous & burdensome as to absorb the revenues and the property of defendant eventually or to seriously impair if not destroy its power to operate its road and discharge its public duties to the State of Texas and thereby in effect confiscate its property & deprive the people of Texas of its resources.

Wherefore defendant says that said law and its results violate the Constitution of the United States and of the State of Texas and is an infringement upon the Sovereign rights of the people & the government of the State of Texas.

W. B. TEAGARDEN,
G. B. FENLEY,
Att'ys for Defend't.

Filed Sept. 22" 1908.

11 *1st Suplemental Petition.* (*Filed* 9/23/08.)

Suit Pending in County Court, Uvalde County, Texas, September Term, A. D. 1908.

No. —.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Comes now the plaintiff in the above entitled and numbered cause, and files this, his first supplemental petition in answer to defendant's amended original answer filed herein on the 22nd day of September, A. D. 1908, and says:

That he excepts generally to said answer, and says that the same shows no defense in law to the matters alleged in plaintiff's petition, wherefore, he prays the judgment of the court.

T. M. MILAM,
Attorney for Plaintiff

And specially excepting to defendant's amended original answer, plaintiff says that the same is insufficient in this: That the defendant pleads and sets up that under a contract with plaintiff, it limited its liability to its own line, and that it delivered to its next succeeding carrier said mohair, and prays judgment. The plaintiff excepts to said defense as set up on the ground that it is no defense under the law; the Act of Congress, called the Railroad Rate Bill, which became a law in August, 1906, under which each receiving carrier is liable for freight lost and may recover from its connecting carrier, or the carrier who lost the goods;

Wherefore, plaintiff prays that this exception be sustained.

T. M. MILAN,
Attorney for Plaintiff.

Filed Sept. 23, 1908.

Statement of Facts. (*Filed* 12/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. —.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Statement of Facts.

12 Be it remembered that upon the trial of the above styled and numbered cause, at the September term, 1908, of the County Court of Uvalde County, Texas, the following were the facts and all the facts admitted in evidence:

The plaintiff, J. D. CROW, being sworn testified in his own behalf in substance as follows:

He is a farmer and stock raiser, and resides about 40 miles from Uvalde, Texas. That on March 11, 1908, he and his neighbor, Mr. T. Jones, loaded their mohair into a wagon and sent the same to Uvalde for shipment, in charge of plaintiff's employé: Each of them had 3½ bags. Plaintiff's agent brought back to plaintiff the bill of lading for his 3½ bags of mohair, which plaintiff produces in court and submits to counsel for defendant for inspection.

The mohair shipped weighed 787 lbs. Plaintiff has an unusually fine quality of goats for the country. He has had a great deal of experience with mohair goats: By comparison, inspection of wool and the grades of the animal, and is perfectly familiar with the different grades of mohair, and can judge of its quality.

He was formerly, for a long time, a cotton buyer and cotton sampler, and that experience was helpful in judging mohair.

The shipment of mohair was his entire clip. It was carefully clipped and prepared for shipping, and was in good condition when shipped.

Plaintiff and his neighbor both shipped their mohair to the Massachusetts Mohair Plush Company, Lowell, Massachusetts.

The grade of plaintiff's mohair was fine.

He never received any returns of pay for the mohair from the Massachusetts Mohair Plush Company, or any other person. The freight rate on the mohair was $1.70 per 100 lbs.

About one month after sending his mohair to the station, he went to Uvalde to make inquiry about it and had a conversation with defendant's agent there with respect to it. Defendant's agent told

him that the mohair went forward on the day after
13 it was delivered by the young man who brought it to town.

Plaintiff's neighbor, Mr. Jones, received a statement from consignees for his mohair about 6 weeks or two months after shipment.

Cross-examination:

Plaintiff's experience with raising mohair goats covers only two or three years; the shipment in question being his total clip. He bought the goats, and has had occasion to compare them with numbers of other herds throughout the country, and to compare their wool with others, and has had the benefit of the experience of others engaged in the business, and has compared his animals and their wool with the other herds claimed to be the finest in the country, and knows from this experience and comparison that his goats and the wool thereon produced is of the best quality in the country.

His mohair was marked (J. D. connected in a circle). The mohair shipped at the same time by Mr. Jones was marked (J. in a circle). The mohair shipped by Mr. Jones was half of the clip from the same flock of goats. Plaintiff and Mr. Jones each bought one-half of the goats, and divided them.

No person out of plaintiff's neighborhood shipped mohair, that he knows of, at the same time. Mohair shipped by plaintiff was not previously ordered by the Massachusetts Mohair Plush Company, but plaintiff shipped it to them on consignment. As a matter of fact plaintiff does not know whether the consignee ever received his mohair or not. He just shipped it to them as a good many others did, and trusted them to treat him right.

Plaintiff offered in evidence portions of the bill of lading, reading as follows:

The Galveston, Harrisburg & San Antonio Railway Company
Bill of Lading, Uvalde, Texas, March 12, 1907.

The Galveston, Harrisburg & San Antonio Railway Company hereby acknowledge receipt from J. D. Crow, (Consignor) the packages named below (Contents and value unknown) in apparent good
order, marked and numbered as per margin, for transporta-
14 tion from the Station above written, to Lowell, Massachusetts.

(Here insert final destination, whether on or beyond this Company's line.) And the Galveston, Harrisburg & San Antonio Railway Company agrees to transport same from the station first above written to Galveston, Texas.

(Here insert final destination of this Company's line or junction point with next connecting carrier if final destination is beyond this Company's line.)

And there deliver in like good order to Massachusetts Mohair Plush Company, (consignees) or *his* assigns, provided destination is on this Company's line, but if final destination is beyond this Company's line, then this Company agrees to deliver said shipment in like good order to its next connecting carrier for consignee's ac-

count; in either event consignee agrees to pay freight and charges as per margin. (Here followed certain special stipulations numbered from 1 to 13 inclusive, which are not offered in evidence by plaintiff.)

In witness whereof, I, as Agent of the *Galveston, Harrisburg, & San Antonio Railway Company,* have signed two bills of lading, one of this tenor and date, one of which being accomplished, the others to stand void.

Dated, Uvalde, Texas, this the 12, day of March, 1907." The bill of lading was properly executed by the parties, and in that portion of the bill set apart to the description of the property, and the name of the consignor and destination was entered Massachusetts Mohair Plush Company, Lowell, Massachusetts 3½ bags of mohair, showing that the Railway Company had received for and shipped under the bill of lading for J. D. Crow 3½ bags of mohair consigned to the Massachusetts Mohair Plush Company, at Lowell, Massachusetts.

It was here conceded in open court by plaintiff that the bill of lading attached to defendant's pleadings and referred to therein, is a duplicate original of the one produced, and parts of which were offered in evidence as above by plaintiff.

Defendant here offered in evidence several of the stipulations and parts of stipulations in the bill of lading not offered in evidence by plaintiff, all of which were excluded by the court upon plaintiff's objections thereto, to which matters, exceptions were saved by defendant.

DAVID HIRD, a witness for plaintiff, testified in substance as follows:

He is 41 years old, resides at Lowell, Massachusetts, His occupation is Boss Wool Sorter, and he is employed by the Massachusetts Mohair Plush Company, and acts as boss wool sorter and receiving clerk for that Company during the year 1907. His duties as receiving clerk were to receive and handle, and make a record of the wool and mohair received by his employers, and he worked in the wool room where it was received.

He was assisted by certain laborers known as floor hands. The floor hands ran the bags in and put them on the scale and removed them from the scale.

Witness inspected and weighed the bags and made a record of them. No one ever besides witness received mohair for his employers. Witness did not receive any bags of mohair consigned to the Massachusetts Mohair Plush Company by J. D. Crow of Uvalde, Texas, shipped from Uvalde, Texas March 12, 1907, nor was any mohair received from such party consigned to the Massachusetts Mohair Plush Company during the year 1907.

Witness was familiar with the market value on the market at Lowell, Massachusetts, during March, April, May and June, 1907, and was familiar with the different grades of mohair, and the market value thereof during the months mentioned at Lowell, Massachusetts. Witness was familiar with the market value of mohair shipped from Uvalde, Texas, on the market at Lowell, Massachusetts during March, April, May and June, 1907. The several grades of mohair shipped

from Uvalde, Texas, to Lowell, Massachusetts during the months named, are as follows: Fine, medium and coarse. The prices for the same *is* as follows: Fine, 30 cents per pound, Medium 24 cents per pound, coarse 18 to 20 cents per pound.

Cross examination:

16 Witness was born and raised in England, leaving there at 24 years of age. He came to United States in 1891. He worked as a wool sorter for 3 years in England. The first 5 years after coming to America he worked in the same capacity for a wool company, and then took employment with the Massachusetts Mohair Plush Company, wool sorter and overseer, where he has been for 12 years. He was wool sorter for his present employer for 6 years, and as second-hand for 4 years and as overseer 2 years.

In the fall of 1906 and the spring of 1907, his employer employed two or three hundred persons.

This warehouse is about 20 feet distance from the factory. 90 per cent of the mohair received by his employer comes to the warehouse in cars on the switch track. About 10 per cent is brought by wagon transportation. The drays employed in such work are owned by the Stanley Transportation Company, who do teaming for most of the corporations of the city. The railroad track adjoins the warehouse. Mohair from the cars are run out by truck to scales in the warehouse, where they are weighed, inspected, recorded and stored. the same course was taken with bags delivered by wagon.

His employer made mohair and worsted pearn and mohair plushes for sale, and in this business used all the mohair received.

They have but one warehouse. Some wool was also received by his employers.

Witness was the only person from December 1906 to the 1st of May 1907, who handled at any time or was engaged in checking mohair received by his employers. He checked the mohair into the room as he weighed it. He inspected each bag, noting the marks thereon as it came out of the car or off the wagon. The checking was done in the warehouse. He attended to the checking of the mohair received by his employers during the time in question in person. He checked it by the letters and bills of lading which were delivered afterwards to the office in Lowell, and from there sent to the business office in Boston, and he cannot, therefore, attach them to his answers.

Witness did in person, during the time above mentioned, check in, weigh and make actual inspection of every bag of mohair received by his employers.

17 It is not true that during the time above referred to at intervals other persons from time to time checked in the mohair and other things received by his employer- at their warehou-e. It is not true that he did not in person inspect and weigh each and every bag of mohair as the same came from the drays or cars, and the actual inspection and weighing was not done in many instances by other persons.

In checking the mohair he used a writing pad or block taking

down thereon the weight of each bag, and it was weighed and noted in the block the weight and marks of identification and compared with the letters or invoices.

It is true that during the dates and times above referred to his employer received large quantities of mohair from Texas and other places. During the season they received the following: From Texas about 2000 bags. From New Mexico, about 330 bags. From Arizona about 200 bags. From Oregon about 50 bags. About 500 per month in the aggregate.

The following question was propounded and answers given;

"Q. It is true is it not from time to time you had numbers of bags of mohair which for want of marks of identification, or because of loss of marks and tags could not be, with absolute certainty, applied to any particular invoice and had to be arbitrarily applied on some invoice as best you could?"

"A. Yes, at times it is difficult to identify bags because of lack of marks of identification. Sometimes they were credited to an invoice upon supposition."

It is true that from time to time his employers had a lot of bags of mohair on hand which could not with absolute certainty be designated as belonging to any particular consignment. It is true that at the end of the receiving season of that year, and at some time during that year, his employers had on hand a number of bags of mohair, the ownership or identity of which was never with
18 certainty located, and for that reason was never applied on any shipment or never was arbitrarily applied. About 10 bags was never applied to any invoice. They are still in the warehouse awaiting orders from the railroad from which they were received as to what shall be done with them. It is true that on many occasions a week or a month, or even greater time would elapse before these bags of doubtful identity would be applied on invoices. About a dozen bags of doubtful identity were received by his employer during that season. They were finally identified and applied on different invoices. Where an order was given and it fell short, and for instance a bag without marks of identification corresponded in quality and weight with the stock order, wherein there was a deficiency, it was credited to that shipment because of the agreements in the respects stated. In some cases 4 or 5 weeks elapsed before the question of identity was finally settled. The witness in most instances attended to the establishment of the identity of the bags of mohair with the several consignments, and sometimes in doubtful cases the superintendent assisted him. This was one in the wool shop. The witness cannot give the particulars of each instance, because they are forgotten. The time after arrival of the mohair within which this was done was sometimes 3 or 4 weeks. There are delays, and sometimes lengthy delays in the arrival of parts of shipments. Two months is the extreme limit of such delays. This length seldom occurs.

The railroads by which his employers receive mohair are the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad, both use the same switches and have trackage facilities to

his employer's warehouse. Such mohair as is not delivered in cars come by wagon and is hauled about half a mile. About 10 per cent of it is delivered by wagon, and the remainder by cars.

The checking was done by witness in the warehouse.

Witness has been engaged 4 or 5 years in the purchase and sale of mohair for the Massachusetts Mohair Company at Lowell, Massachusetts.

There are many grades of mohair, fine, medium, coarse,
19 long and short, clear and kempy.

The wool sorters at his employer's mill make about 14 different grades of mohair. Witness cannot give the commercial names of the different grades and the difference in value between the several grades.

It is true that the length and fineness of the fiber, as well as dirt, burs and color have much to do with the class and grade of mohair. And it is true that a great many things have to be considered to determine the grade of mohair, and that no man can grade it without seeing it and giving it a personal examination.

From foreign countries his employer received about 800 bags of mohair. This was Turkish mohair from Turkey.

Witness has refreshed his memory in this matter from his receiving book in his possession in Lowell, Massachusetts. It is a bulky book and used continually in the business of his employers, and he cannot attach to his answers the book or a copy thereof for the reasons stated.

Plaintiff closes.

Defendant offered in evidence the testimony in the form of deposition of George Alter taken in the City of New York, on the 10th of June 1908; also the testimony of H. Thompson and Thomas R. Belden taken at San Antonio, Texas, September 12, 1908, and the testimony of F. M. Hasselmeir taken in Galveston, Texas, September —, 1908, for the purpose of proving that defendant delivered the mohair in question to the Morgan Line of Steamships at Galveston, Texas; and for the purpose of showing delivery by that Company in New York of the mohair in question to the Metropolitan Steamship Company, a common carrier by water between New York and Massachusetts points, all of which was excluded by the court upon objection of plaintiff, and exceptions saved by defendant.

Defendant closes.

We hereby agree that the within and foregoing statement is a true and correct statement of all the facts introduced in evidence
20 at the trial of this cause, and that the same, after having the approval of the court, shall be filed and made a part of the record, and shall be transmitted to the Court of Civil Appeals, as provided by law, and there accepted and acted upon as the statement of facts in this case.

T. M. MILAM,
Attorneys for Plaintiff.
W. B. TEAGARDEN,
G. B. FENLEY,
Attorneys for Defendant.

The foregoing statement of facts having been agreed to by the parties, was this day submitted to me for inspection and approval, and after examination of the same, the same is found by me to be correct, and is therefore, now approved and the Clerk of this Court is hereby ordered to file the same and make it a part of the record of this cause, and to transmit it in its original form under his certificate and seal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, along with the transcript in this case, as provided by law.

This October 12th, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Pending in County Court, Uvalde County, Texas.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

I, Zena Dalrymple, Clerk of the County Court in any for Uvalde County, Texas, do hereby certify that the above and foregoing 12 pages is the original statement of facts filed in this cause, and approved by the Court, and the same which I have been directed to certify to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, along with the record in this cause on appeal.

Given under my hand and seal of office, this 23 day of November, 1908.

[SEAL.]

ZENA DALRYMPLE,
County Clerk, Uvalde County, Texas.

Filed 12/15/08.

21 *Charge of the Court.* (*Filed* 9/23/08.)

In the County Court of Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Gentlemen of the Jury:

1st. You are instructed by the Court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a Common Carrier, and as such Common Carrier, is liable to any person from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration,

and bills the same, from a point in one state to a point in the same, or any other state of the Union, for any damage to or loss of such freight while being so transported, not caused by the Act of God, or at hands of Public Enemy.

2nd. You are further instructed that if you believe from a preponderance of the evidence in this case, that the plaintiff, J. D. Crow, on or about March 12th, 1907, delivered to the defendant, at Uvalde, Texas, Mohair for shipment; and that the defendant received said Mohair for shipment; and that the defendant received said Mohair, and billed the same to the Massachusetts Mohair Plush Company at Lowell, Mass.: And if you further believe from a preponderance of the evidence, that said Mohair so delivered by plaintiff to defendant, if any, or any part of same, was not delivered to the Consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff.

3rd. If your verdict should be for the plaintiff under the instructions given in this charge, then you will find from the evidence what the market value of the Mohair so delivered to defendant, if any, at Lowell, Mass., at the time the same should have arrived at Lowell, Mass., if it had been transported with reasonable care and diligence. Then you will determine what the freight on said
22 Mohair was, or would have been if paid, from Uvalde, Texas, to Lowell, Mass. Then you will find the difference, if any, between the Market Value of said Mohair, at Lowell, Mass., as found by you, and said freight as found by you, and in the event the market value of said mohair as found by you, exceeds said freight, as found by you, you will find for the plaintiff for said difference, together with 6% interest from date when same should have been delivered at Lowell, Mass.

4th. In a civil suit, the plaintiff is required to prove by a preponderance of the evidence all the material facts necessary to his case.

5th. You are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony, but the law you will receive from the Court and be governed thereby.

W. D. LOVE,
County Judge, Uvalde County, Tex.

Filed Sept. 23", 1908.

Verdict of the Jury.

We, the Jury, find in favor of plaintiff for the amount of $240.91 (Two hundred forty ninety one c'ts).

G. K. CHINN, *Foreman.*

Judgment of the Court. (*Filed* 9/24/08.)

Pending in County Court Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

On this, the 23rd day of September 1908, this cause coming on to be heard on the defendant's demurrer and its special exception to plaintiff's petition all parties appearing both the general demurrer and the said special exception after due consideration are, by the court found to be without merit and the same are each therefore in all things overruled:

To this ruling of the court defendant promptly excepted: And immediately thereafter came on to be heard the general
23 special exception of plaintiff (contained in his first supplemental petition this day filed) to defendant's entire special answer contained in its 1st amended answer filed Sept. 22nd 1908. And after a hearing of the said demurrer and exception the court is of the opinion that the matters and things stated in the answer & the special stipulation in the contract relied upon and the contract itself constitute no defense and the demurrer and exceptions are therefore in all things sustained and said special answer stricken out: to which ruling of the court defendant promptly excepted:

And on the same day this cause coming on further to be heard on the facts all parties announced ready for trial and thereupon came a jury of good and lawful men to wit, G. K. Chinn and five others who after being duly empanelled and sworn to try the case heard the reading of the pleading and all the evidence, the argument of counsel and the reading of the charge of the court and then retired by direction of the court in charge of an officer to consider of their verdict and thereafter on the same day returned into open court the following verdict, to wit:

"We, the jury, find in favor of the plaintiff for the Amount of $240.91 (Two Hundred forty ninety-one c'ts).

G. K. CHINN, *Foreman.*"

It is therefore ordered, adjudged and decreed by the court that the plaintiff, J. D. Crow do have and recover of and from the defendant, the Galveston, Harrisburg & San Antonio Railway Company the sum of Two hundred forty & 91/100 Dollars with six per cent interest per annum thereon from this date until paid and all costs of suit for all of which let execution issue.

Filed Sept. 24", 1908.

Motion for New Trial. (*Filed* 9/24/08.)

Pending in County Court Uvalde County, Texas, September Term, 1908.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Now comes defendant and moves the court that the verdict
24 and judgment rendered against it in this cause on this date be set aside and a new trial granted for the following reasons:

First. The court erred in overruling defendant's general demurrer to plaintiff's petition.

Second. The court erred in overruling defendant's special exception to plaintiff's petition.

Third. The court erred in sustaining plaintiff's special exception to defendant's special answer thereby striking out defendant's entire special answer in which it is claimed that under the contract and in law it was bound only to transport the mohair to the end of its line and deliver to its connecting carrier after which its liability ceased all of which it did without fault, damage or loss.

Fourth. The court erred in all that part of the charge to the jury wherein it is in effect charged that if defendant accepted the Mohair for transportation to Lowell, Massachusetts, as charged it is liable absolutely and without reference to where & by whom it was lost, if lost, and without reference to any special stipulations that that may have been incorporated in the contract & even though defendant was itself guilty of no fault or negligence & providing only that the Mohair was lost or not delivered at destination, unless its loss was due to the act of God or the public enemy. In other words holding that even though defendant, as in this case, contracted only to carry the mohair to the end of its own line & there to deliver it to a connecting carrier; and even though contract was faithfully performed without fault or wrong nevertheless defendant would be liable as at common law if the mohair was not finally delivered to consignee at destination.

Fifth. The verdict and judgment are contrary to law, con-
25 trary to the facts, against the overwhelming weight of the facts and without facts to support them in this: It is not shown that the mohair was not delivered at destination to consignees on the contrary it appears that consignees actually now have on hand ten surplus bags of Mohair not applied on any invoices and it appears that during the season they have arbitrarily applied Mohair as received in numerous instances when in doubt about its identity, to invoices, when whether it really belonged to them or not, was a mere matter of guess. Whereas it is shown that defendant delivered the mohair without fault and without delay or damage to its next connecting carrier and was guilty of no wrong, and that same was by that carrier in turn delivered to its next connecting carrier.

Wherefore defendant says that the verdict and judgment ought to be set aside and a new trial granted.

W. B. TEAGARDEN &
G. B. FENLEY,
Att'ys for Defendant.

Filed Sept. 24", 1908.

Order Overruling Motion for New Trial. (*Filed* 9/24/08.)

No. 460.

Pending in County Court Uvalde County, Texas, September Term, 1908.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

On this the 24th day of September 1908 this cause come on to be heard on defendant's motion for a new trial and all parties appearing the same was heard and considered and from such hearing and consideration of the motion the court finds the same without merit and it is therefore in all things overruled and denied: To this ruling defendant in open court promptly excepted and gave notice of appeal to the court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio, Texas:

And upon the oral motion of defendant the space of twenty days' time after adjournment of this court is allowed within which to settle and file all bills of exception and the space of thirty days' time is allowed defendant within which to settle and file a statement of facts in this case.

Filed Sept. 24", 1908.

26 *Bill of Exception No. 1.* (*Filed* 10/15/08.)

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Pending in County Court, Uvalde County, Texas, September Term, 1908.

Bill of Exception No. 1.

Be it Remembered that upon the trial of the above styled cause in said court at the September term thereof, and during the introduction of testimony before the jury, the defendant offered in evidnce a certain stipulation contained in the bill of lading, for the

shipment in question, portions of which bill of lading plaintiff had already given in evidence, the stipulation so offered by defendant reading as follows:

"It is expressly stipulated as a condition precedent to the issuance of this through bill of lading and guarantee of through rate that the liability of the said Galveston, Harrisburg & San Antonio Railway Company is limited to its own line, and shall cease and determine upon delivery to a connecting common carrier of the articles herein mentioned, and in case of loss, damage or injury to any of said articles, that carrier alone shall be liable in whose (actual) custody said articles were at the time of such loss, damage, or injury."

To which stipulation and evidence plaintiff objected for the reason that the same is irrelevant, immaterial and incompetent in that it being undisputed that defendant received the mohair at Uvalde for shipment to the consignees at Lowell, Massachusetts, it could not under the act of Congress of June 1906, limit its liability to its own line, but by reason of the acceptance of the mohair for such transportation became liable absolutely as at common law for its delivery to the consignees at destination, and this contract to the contrary is void and tends to prove no defense to the action. Which objections were sustained and the testimony was excluded for the reasons stated in plaintiff's objections.

27 To this ruling and action of the Court, defendant then and there promptly excepted and it now tenders this its bill of exception to said ruling and action of the court, and prays that the same be approved and ordered filed and made a part of the record in this cause.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

This bill of exception having been submitted to me, is now hereby agreed to.

This the 6th day of October, 1908.

T. M. MILAM,
Att'y for Plaintiff.

The foregoing bill of exception having been submitted to plaintiff's counsel and approved by him, and submitted to me for action, I now hereby approve the same, and the Clerk of this court is hereby ordered to file same and make it a part of the record in this cause, and to certify.

This the 12th day of October, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Filed October 15th, 1908.

Bill of Exception No. 2. (Filed 10/15/08.)

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Pending in County Court, Uvalde County, Texas, September Term, 1908.

Bill of Exception No. 2.

Be it Remembered that upon the trial of the above styled cause in said court at the September term thereof, and during the introduction of testimony before the jury, the defendant offered in evidence a certain stipulation contained in the bill of lading plaintiff had already given in evidence, the stipulation so offered by defendant reading as follows:

28 "No carrier accepting the said articles for transportation shall be liable for damage to, or loss or destruction of said articles by fire, or for loss, damage or delay caused by unavoidable causes, or by quarantine regulations, strikes, riots or stoppage of labor, highway robbery, wrecking of train, or by collisions or any of the dangers of navigation and perils of the sea while on seas, gulfs, lakes, rivers or canals: Provided that this stipulation shall not exempt any carrier from liability for the negligence of its agents or servants."

To this stipulation and evidence plaintiff objected because it was not supported by any pleadings and because the same is irrelevant, immaterial and incompetent in that it being undisputed that defendant received the mohair at Uvalde for shipment to the consignees at Lowell, Massachusetts, it could not under the act of Congress of June 1906, limit its liability to its own line, but by reason of the acceptance of the mohair for such transportation, became liable absolutely as at common law for its delivery to the consignees, at destination, and this contract to the contrary is void and tends to prove no defense to the action. Which objections were sustained and the testimony was excluded for the reasons stated in plaintiff's objections.

To this ruling and action of the Court, defendant then and there promptly excepted and it now tenders this its bill of exception to said ruling and action of the court, and prays that the same be approved and ordered filed and made a part of the record in this cause.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

This bill of exception having been submitted to me, is now hereby agreed to.

This the 6th day of October, 1908.

T. M. MILAM,
Att'y for Plaintiff.

The foregoing bill of exception having been submitted to plaintiff's counsel and approved by him, and submitted to me for
29 action, I now hereby approve the same, and the Clerk of this Court is hereby ordered to file and make it a part of the record in this cause.

This the 12th day of October, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Filed Oct. 15, 1908.

Bill of Exception No. 3. (*Filed* 10/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Bill of Exception No. 3.

Be it Remembered that upon the trial of the above styled cause in said court at the September term thereof, and during the introduction of testimony before the jury, the defendant offered in evidence a certain stipulation contained in the bill of lading, for the shipment in question, portions of which bill of lading plaintiff had already given in evidence, the stipulation so offered by defendant reading as follows:

"It is further stipulated that in the event of loss, detriment or damage done to or sustained by the property herein mentioned during transportation from place of shipment to place of destination that in estimating the amount of loss or damage so occurring, so far as it shall fall on the Galveston, Harrisburg & San Antonio Railway Company or any carrier accepting said articles for transportation under this bill of lading, *and* value and price of the articles herein mentioned, at the place and time of shipment under this bill of lading, shall be taken as the true price and value thereof."

To this stipulation and evidence plaintiff objected because there was no pleadings to support it, and because it is not the lawful measure of damages, and is an attempt to contract against the defendant's common law liability which is forbidden by the act of Congress of June, 1906.

30 The objections so made were sustained by the court, and the testimony was excluded for the reasons set out in the objections.

To this ruling and action of the court, defendant then and there promptly excepted and it now tenders this its bill of exception to said

ruling and action of the court, and prays that the same be approved and ordered filed and made a part of the record in this cause.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

This bill of exception having been submitted to me, is now hereby agreed to.

This the 6th day of October, 1908.

T. M. MILAM,
Att'y for Plaintiff.

The foregoing bill of exception having been submitted to plaintiff's counsel and approved by him, and submitted to me for action, I now hereby approve the same, and the Clerk of this court is hereby ordered to file same and make it a part of the record in this cause.

This the 12th day of October, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Filed October 15th, 1908.

Bill of Exception No. 4. (*Filed* 10/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Bill of Exception No. 4.

Be it remembered that upon the trial of the above styled and numbered cause in said court at the September term, 1908 thereof, and during the introduction of testimony defendant offered in
31 evidence the testimony by deposition of H. Thompson, taken at San Antonio, Texas on the 12th day of September 1908, in substance as follows:

That witness was in the month of March, 1907, employed by the Galveston, Harrisburg & San Antonio Railway Company at San Antonio, Texas as a clerk in the freight department.

That he checked at San Antonio from Wabash car No. 71411 into S. P. car No. 19183 on its arrival in San Antonio 3½ bags of mohair shipped by J. D. Crow from Uvalde, Texas to the Massachusetts Mohair Plush Company at Lowell Massachusetts, on way bill Uvalde to New York, N. Y. No. 8, dated March 13, 1907, which left Uvalde in Wabash car No. 71411. That witness checked said shipment out on said way bill and so transferred it into said car No. 19183,

and the same was forwarded to Houston, Texas. Which deposition being submitted to the Court was found to contain the testimony substantially as above stated; *to this testimony* the same being offered for the purpose of showing that defendant in compliance with its contract delivered the mohair in question to its next connecting carrier in good condition.

To this testimony plaintiff objected for the following reasons:

That the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action, for the reason that it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignees at Lowell, Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906 it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. Which objections were sustained by the court and the said testimony of the said witness excluded for the reasons urged by plaintiff against it; to which ruling of the court, the
32 defendant then and there promptly excepted and now tenders this its bill of exception to the ruling and action of the court, and prays that same be approved and ordered filed and made a part of the record in this cause on appeal.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Approved,

T. M. MILAM,
Att'y for Plaintiff.

The foregoing bill of exception having been submitted to counsel for plaintiff and agreed to by him, and then submitted to me for action, I now, after examination of same, approve the same, and the Clerk of this Court is now hereby ordered to file this bill of exception and make the same a part of the record in this cause.

This 12th day of October, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Filed October 15th, 1908.

Bill of Exception No. 5. (*Filed* 10/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Bill of Exception No. 5.

Be it remembered that upon the trial of the above styled and numbered cause in said court at the September term, 1908, thereof, and during the introduction of testimony, the defendant offered in evidence certain testimony of Thomas R. Belden by deposition taken at San Antonio, Texas, September 12, 1908, which testimony so offered was, as shown by the deposition, substantially as follows:

That in the month of March, 1907, said witness was employed by defendant as foreman at its freight house in San Antonio;

33 That he had something to do with the shipment of the mohair in question at San Antonio; that is, he broke the seal of the car in which said shipment arrived at San Antonio from Uvalde on its arrival, and that both sides of the car bore the unbroken seals of the Uvalde station.

That the shipment was transferred from that car to S. P. car No. 19183 as shown by his records, which car was sealed immediately after being loaded.

Which testimony was offered by defendant for the purpose of corroborating the testimony of Thompson and Hasselmier, and tending to show compliance with its contract by delivery of the mohair in question in good order to the Morgan Line of Steamships at Galveston, Texas, for further transportation to its destination.

The depositions being produced showed that the testimony of the witness was substantially as above stated.

To this testimony plaintiff objected for the following reasons:

That the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action, for the reason that it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignees at Lowell, Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906, it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. Which objections were sustained by the court and the said testimony of the said witness excluded for the reasons urged by plaintiff against it; to which ruling of the court, the defendant then and there promptly excepted and now tenders this its bill of

exception to the ruling and action of the court, and prays that same be approved and ordered filed and made a part of the record
34 in this cause on appeal.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Approved,
T. M. MILAM,
Att'y for Plaintiff.

The foregoing bill of exception having been submitted to counsel for plaintiff and agreed to by him, and then submitted to me for action, I now, after examination of same, approve the same, and the Clerk of this Court is now hereby ordered to file this bill of exception and make the same a part of the record in this cause.

This 12th day of October, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Filed October 15th, 1908.

Bill of Exception No. 6. (*Filed* 10/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Bill of Exception No. —.

Be it remembered that upon the trial of the above styled and numbered cause at the September Term, 1908, of the County Court of Uvalde County, Texas, and during the admission of testimony before the jury, the defendant offered in evidence the deposition of F. M. Hasselmeir, which contains in substance the following testimony so given by said witness, and which facts defendant desired to prove by said witness, and same appears in said deposition in substance as follows:

That the witness was during the month of March, 1907, and for a long time thereafter the Checking Clerk for the Morgan Line of Steamships in Galveston, Texas, and was employed by that company on the docks at Galveston to check freight from the cars to
35 the steamers, and that the business of said company was transporting freight from Galveston to New York and from New York to Galveston.

That according to his check slip from which he testified, he checked 24 bags of mohair on March 24, out of a certain car at

the Southern Pacific docks at Galveston, Texas, into the Steamship El Norte on its trip No. 140 of March 24, 1907, to New York.

That the said shipment of mohair came out of S. P. car No. 19183, and the witness does not remember the way bill, and can only identify the parcels by his check slip now before him, which deposition being submitted to the court was found to contain the testimony substantially as stated.

The introduction of this testimony was objected to by plaintiff for the following reasons:

That the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action, for the reason that it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignees at Lowell, Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906 it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. Which objections were sustained by the court and the said testimony of the said witness excluded for the reasons urged by plaintiff against it; to which ruling of the court, the defendant then and there promptly excepted and now tenders this its bill of exception to the ruling and action of the court, and prays that same be approved and ordered filed and made a part of the record in this cause on appeal.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Correct:
T. M. MILAM,
Attorney for Plaintiff.

36 The foregoing bill of exception having been submitted to counsel for plaintiff and agreed to by him, and then submitted to me for action, I now, after examination of same, approve the same, and the Clerk of this Court is now hereby ordered to file this bill of exception and make the same a part of the record in this cause.

This 12th day of October, 1908.

W. D. LOVE,
County Judge Uvalde County, Texas.

Filed October 15th, 1908.

Bill of Exception No. 7. (*Filed* 10/15/08.)

Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Bill of Exception No. 7.

Be it remembered that upon the trial of the above styled and numbered cause, at the September term 1908, of the County Court of Uvalde County, Texas, and during the introduction of testimony before the jury, defendant produced and offered in evidence the testimony by deposition of George Alter, which deposition was properly taken and returned into court on the — day of May, 1908, for the purpose of showing; that on behalf of the Morgan Line of Steamships, a common carrier by water between Galveston, Texas and New York City, in the State of New York, that he did deliver to the Metropolitan Steamship Company in the City and State of New York, which Metropolitan Steamship Company is a common carrier by water between the City of New York and points in the State of Massachusetts, the identical mohair sued for by plaintiff, for further transportation by said Metropolitan Steamship Company to the consignees at destination, and that the said mohair arrived in New York from Galveston, on the said Morgan Steamship Line, El Norte, on its
37 trip No. 140, and that on behalf of said Morgan Steamship Line he, the said witness, took and caused to be taken receipts for the same from the said Metropolitan Steamship Company, which latter Company thereby obligated itself to carry the said mohair to Lowell, Massachusetts, and deliver the same to said Massachusetts Mohair Plush Company; and that when the witness delivered the same to the said Metropolitan Steamship Company, the said mohair was intact and in good condition. The deposition of the witness being exhibited to the court, it is found therefrom that his testimony, so offered by defendant, is substantially as above stated.

To the introduction of this testimony the plaintiff objected for the reason that the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action, for the reason that it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignees at Lowell, Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906 it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. Which objections were sustained by the court and

the said testimony of the said witness excluded for the reasons urged by plaintiff against it; to which ruling of the court, the defendant then and there promptly excepted and now tenders this its bill of exception to the ruling and action of the court, and prays that same be approved and ordered filed and made a part of the record in this cause on appeal.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Approved,
T. M. MILAM,
Attorney for Plaintiff.

The foregoing bill of exception having been submitted to counsel for plaintiff and agreed to by him, and then submitted to
38 me for action, I now, after examination of same, approve the same, and the Clerk of this Court is now hereby ordered to file this bill of exception and make the same a part of the record in this cause.

This 12th day of October, 1908.

W. D. LOVE.
County Judge, Uvalde County, Texas.

Filed October 15th, 1908.

Appeal Bond. (*Filed* 10/15/08.)

Pending in the County Court of Uvalde County, Texas.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

Whereas, in the above styled and numbered cause pending in said court the plaintiff J. D. Crow, on the 23rd day of September, 1908, recovered a judgment against the defendant, Galveston, Harrisburg & San Antonio Railway Company for the sum of Two Hundred and forty and 91/100 ($240.91) Dollars with interest, and for costs; and said defendant's motion for new trial having been overruled and notice of appeal given, said defendant desires to appeal said cause to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and desires also to suspend the execution of said judgment pending such appeal.

Now therefore, we the said Galveston, Harrisburg & San Antonio Railway Company as principal and The United States Fidelity & Guaranty Company, as surety, acknowledge ourselves bound to pay to the said J. D. Crow, plaintiff, the sum of Six Hundred ($600.00) Dollars, conditioned that the said Galveston, Harrisburg & San Antonio Railway Company shall prosecute its said appeal with effect;

and in case the judgment of the Supreme — or Court of Civil Appeals shall be against it, that it shall perform its judgment, sentence, or decree and pay all such damages as said court may award against it.

39 Witness our hands this, the 29th day of September, 1908.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By Its Agent & Attorney, W. B. TEAGARDEN.
[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By EDWD. R. LEWIS AND E. P. PHELPS,
Its Attorney- in Fact.

I have fixed the probable costs in the above numbered and entitled cause in the Supreme Court, in the Court of Civil Appeals and in the Court below at the sum of $50.00, Fifty Dollars, and approve the foregoing Bond on this the 15th day of October, 1908.

ZENA DALRYMPLE,
Clerk County Court of Uvalde County, Texas.

Filed Oct. 15" 1908.

Assignment of Errors. (*Filed* 11/18/08.)

Pending in County Court, Uvalde County, Texas.

No. 460.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Defendant's Assignment of Errors.

Now comes the defendant and complains that upon the trial of this cause the Court committed manifest error to the prejudice of defendant and which it desires reviewed on appeal as follows:

First Error.

The court erred in overruling defendant's general demurrer because plaintiff's petition stated no cause of action over which the Court had jurisdiction: On the contrary, the cause of action stated in the petition is one created by the Act of Congress of the United States of June 29th, 1906, and one over which the courts of the United States and the Interstate Commerce Commission alone have jurisdiction to try.

40 *Second Error.*

The court erred in sustaining plaintiff's special exception contained in his first supplemental petition to all that part of defendant's special answer wherein it is claimed, in substance, that the mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment, whereby defendant contracted only to safely carry the mohair and deliver it to the next connecting carrier after which its liability should cease; and wherein it is further claimed that said contract was in all respects strictly complied with and the mohair, if lost at all, was lost by one of the connecting carriers and not by defendant.

Third Error.

The court erred in excluding from the jury that portion of the contract of shipment offered in evidence by defendant which reads as follows:

It is expressly stipulated as a condition precedent to the issuance of this through bill of lading and guarantee of through rate that the liability of the said Galveston, Harrisburg & San Antonio Railway Company is limited to its own line, and shall cease and determine upon delivery to a connecting common carrier of the articles herein mentioned, and in case of loss, damage or injury to any of said articles, that carrier alone shall be liable in whose (actual) custody said articles were at the time of such loss, damage, or injury."

All of which more fully appears in defendant's Bill of Exception No. 1, which is referred to and made a part hereof.

Fourth Error.

The court erred in giving to the jury the second paragraph of the general charge, which reads as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case, that the plaintiff, J. D. Crow, on or about March 12th, 1907, delivered to the defendant at Uvalde, Texas, Mohair for shipment; and that the defendant received
41 said Mohair, and billed the same to the Massachusetts Mohair Plush Company at Lowell, Mass.: And if you further believe from a preponderance of the evidence, that said Mohair so delivered by plaintiff to defendant, if any, or any part of same, was not delivered to the consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff."

Fifth Error.

The court erred in giving to the jury the 1st paragraph of the Main Charge, which reads as follows:

"You are instructed by the Court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and as such common carrier, is liable to any per-

son from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration, and bills the same, from a point in one state to a point in the same, or any other state of this Union, for any damage to or loss of such freight while being so transported, not caused by the Act of God, or at hands of Public Enemy."

Sixth Error.

The court erred in excluding the testimony by deposition of the witness Thompson to the effect that as a clerk for defendant in March, 1907, he transferred all Mohair in question on its arrival at San Antonio to S. P. Car No. 19183, taking it from the car in which it was shipped from Uvalde to San Antonio, and it was forwarded to Houston in the former car, all of which more fully appears in defendant's Bill of Exception No. 4, which is referred to and made a part hereof.

Seventh Error.

The court erred in excluding the testimony of defendant's witness Belden, to the effect that as an employee of defendant at San Antonio he examined and broke the seals of the car containing plaintiff's mohair on its arrival at San Antonio from Uvalde in March, 1907; that the Uvalde seals were intact on its arrival at San Antonio; also that the Mohair was transferred into S. P. Car
42 No. 19183 and this car was sealed immediately when loaded, all of which more fully appears in defendant's Bill of Exception No. 5 which is referred to and made a part hereof.

Eighth Error.

The court erred in excluding the testimony of defendant's witness Hasselmeir, to the effect that as an employé of the Morgan Line of Steam Ships at the docks at Galveston, Texas, he checked a shipment of twenty-four bags of Mohair out of S. P. Car No. 19183 into Steamship El Norte on its trip No. 140 to New York, March 24th, 1907, all of which more particularly appears in defendant's Bill of Exception No. 6, which is refered to and made a part hereof.

Ninth Error.

The court erred in excluding the testimony of defendant's witness Alter, to the effect that the Morgan Line Steamship El Norte conveyed to New York, on its trip No. 140, the identical Mohair sued for by plaintiff, and as the agent for said Morgan Line he transferred it all in good order to the Metropolitan Steamship Company, the Next connecting Carrier, for further transportation on the route to destination, taking receipts therefor, all of which more particularly appears in defendant's Bill of Excepion No. 7, which is referred to and made a part hereof.

Tenth Error.

The court erred in overruling defendant's Motion for a New Trial, because the verdict and judgment are contrary to law, without any facts to support them, or, at least, against the overwhelming weight of the facts, in this:

Plaintiff wholly failed to show that the Mohair in Question was not actually delivered to the consignees at destination. On the contrary, the undisputed facts show that for many months after time for the mohair to arrive, the consignees had a number of bags of mohair—many more than plaintiff lost—which had been by the carriers delivered to them, and which they had not identified
43 and applied to any shipments because the marks had become obliterated or defaced, which unclaimed mohair was still in the hands of consignees at the time of the trial, and part of it, no doubt, is the Mohair in question.

And it further appears that the consignees have arbitrarily applied bags of Mohair in many instances to shipments when, because of defaced marks, this was mere guess-work, and it is reasonably certain that plaintiff's Mohair was thus disposed of by the consignees, if it is not in fact now in their possession in the form of the numerous unidentified bags held by them.

W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Defendant.

Filed Nov. 18", 1908.

44 *Clerk's Bill of Costs.*

No. 460.

J. D. CROW, Pl't'ff,
vs.
G., H. & S. A. RY. CO., Def't'd.

To. G., H. & S. A. Ry. Co., Dr., To Officers of Court.

Clerk's Costs.

Docketing	.10
Motion	.50
Citation & Copy	.50
5 Precepts to serve Interrogatories	2.50
5 Commissions to take depositions	2.50
2 appearances	.10
Continuance	.10
Order	.50
Judgment	.50
Jury	.25
Verdict of Jury	.25
Filing 44 papers	2.20

Copies of 6 Interrogatories, Direct & Cross	10.55
Costs	.25
	$20.80
County Judge	3.00
Jury fee, deposited by Def't'd	5.00

Sheriff's & Constable's Fees,

Citation & mileage	.90
Executing 5 precepts	3.70
Jury Fee	.50
	$5.10

Notary Public Fees.

J. J. Pickman, paid by Def't'd	15.00
Charles Franklin	15.00
M. F. Baker, pd. by Def't'd	3.00
	$33.00

Recapitulation.

Clerk's Costs	$20.80
Sheriff's Costs	5.10
Judge's Costs	3.00
Notary Public	33.00
Jury Fee	5.00
	$66.90

45 THE STATE OF TEXAS,
County of Uvalde:

I, Zena Dalrymple, Clerk of the County Court in and for Uvalde County, Texas, hereby certify that the above and foregoing pages contain a true and correct transcript of all proceedings had in cause No. 460, J. D. Crow, vs. G., H. & S. A. Ry. Co. as same appears on file in this office.

Given under my hand and seal of office, this 5th day of December, A. D. 1908.

[SEAL.]

ZENA DALRYMPLE,
Clerk County Court, Uvalde County, Texas.

46 Pending in County Court, Uvalde County, Texas, September Term, 1908.

No. —.

J. D. CROW
vs.
G., H. & S. A. RY. CO.

Statement of Facts.

Be it remembered that upon the trial of the above styled and numbered cause, at the September term, 1908, of the County Court of Uvalde County, Texas, the following were the facts and all the facts admitted in evidence:

The plaintiff, J. D. Crow, being sworn testified in his own behalf in substance as follows:

He is a farmer and stock raiser, and resides about 40 miles from Uvalde, Texas. That on Mrach 11, 1908, he and his neighbor, Mr. T. Jones, loaded their mohair into a wagon and sent the same to Uvalde for shipment, in charge of plaintiff's employé: Each of them had 3½ bags. Plaintiff's agent brought back to plaintiff the bill of lading for his 3½ bags of mohair, which plaintiff produces in court and submits to counsel for defendant for inspection.

The mohair shipped weighed 787 lbs. Plaintiff has an unusually fine quality of goats for the country. He has had a great deal of experience with mohair goats: By comparison, inspection of wool and the grades of the animal, and is perfectly familiar with the different grades of mohair, and can judge of its quality.

He was formerly, for a long time, a cotton buyer and cotton sampler, and that experience was helpful in judging of mohair.

The shipment of mohair was his entire clip. It was carefully clipped and prepared for shipping, and was in good condition when shipped.

Plaintiff and his neighbor both shipped their mohair to the Massachusetts Mohair Plush Company, Lowell, Massachusetts.

The grade of plaintiff's mohair was "fine."

47 He never received any returns or pay for the mohair from the Massachusetts Mohair Plush Company, or any other person. The freight rate on the mohair was $1.70 per $100 lbs.

About one month after sending his mohair to the station, he went to Uvalde to make inquiry about it and had a conversation with defendant's agent there with respect to it. Defendant's agent told him that the mohair went forward on the day after it was delivered by the young man who brought it to town.

Plaintiff's neighbor, Mr. Jones, received a statement from consignees for his mohair about 6 weeks or two months after shipment.

Cross-examination:

Plaintiff's experience with raising mohair goats covers only two or three years; the shipment in question being his total clip. He bought

the goats, and has had occasion to compare them with numbers of other herds throughout the country, and to compare their wool with others, and has had the benefit of the experience of others engaged in the business, and has compared his animals and their wool with the other herds claimed to be the finest in the country, and knows from this experience and comparison that his goats and the wool thereon produced is of the best quality in the country.

His mohair was marked  (J D connected in a circle). The mohair shipped at the same time by Mr. Jones, was marked  (J in a circle). The mohair shipped by Mr. Jones was half of the clip from the same flock of goats. Plaintiff and Mr. Jones each bought one-half of the goats, and divided them.

No person out of plaintiff's neighborhood shipped mohair, that he knows of, at the same time.

Mohair shipped by plaintiff was not previously ordered by the Massachusetts Mohair Plush Company, but plaintiff shipped it to them on consignment. As a matter of fact plaintiff does not know whether consignees ever received his mohair or not.

48 He just shipped it to them as a good many others did, and trusted them to treat him right.

Plaintiff offered in evidence portions of the bill of lading, reading as follows:

The Galveston, Harrisburg & San Antonio Railway Company's Bill of Lading, Uvalde, Texas, March 12, 1907.

The Galveston, Harrisburg & San Antonio Railway Company hereby acknowledges receipt from J. D. Crow, (Consignor) the packages named below (contents and value unknown) in apparent good order, marked and numbered as per margin, for transportation from the Station first above written, to Lowell, Massachusetts.

(Here insert final destination, whether on or beyond this Company's line.) And the Galveston, Harrisburg & San Antonio Railway Company agrees to transport same from the station first above written to Galveston, Texas.

(Here insert final destination of this Company's line or junction point with next connecting carrier if final destination is beyond this Company's line.) And there deliver in like good order to Massachusetts Mohair Plush Company, (consignees) or his assigns, provided destination is on this Company's line, but if final destination is beyond this Company's line, then this Company agrees to deliver said shipment in like good order to its next connecting carrier for consignee's account; in either event consignee agrees to pay freight and charges as per margin. (Here followed certain special stipulations numbered from 1 to 13 inclusive, which are not offered in evidence by plaintiff.)

In witness whereof, I, as Agent of the *Galveston, Harrisburg & San Antonio Railway Company*, have signed two bills of lading, one of this tenor and date, one of which being accomplished, the others to stand void.

Dated, Uvalde, Texas, this the 12 day of March, 1907."

49 The bill of lading was properly executed by the parties, and in that portion of the bill set apart to the description of the property, and the name of the consignor and destination was entered Massachusetts Mohair Plush Company, Lowell, Massachusetts 3½ bags of mohair, showing that the Railway Company had received for shipment under the bill of lading for J. D. Crow 3½ bags of mohair consigned to the Massachusetts Mohair Plush Company at Lowell, Massachusetts.

It was here conceded in open court by plaintiff that the bill of lading attached to defendant's pleadings and referred to therein, is a duplicate original of the one produced, and parts of which were offered in evidence as above by plaintiff.

Defendant here offered in evidence several of the stipulations and parts of stipulations in the bill of lading not offered in evidence by plaintiff, all of which were excluded by the court upon plaintiff's objections thereto, to which matters, exceptions were saved by defendant.

DAVID HIRD, a witness for plaintiff, testified in substance as follows:

He is 41 years old, reside at Lowell, Massachusetts, His occupation is Boss Wool Sorter, and he is employed by the Massachusetts Mohair Plush Company, and acted as boss "wool sorter" and receiving clerk for that Company during the year 1907. His duties as receiving clerk were to receive and handle, and make a record of the wool and mohair received by his employers, and he worked in the wool room where it was received.

He was assisted by certain laborers known as floor hands. The floor hands ran the bags in and put them on the scale and removed them from the scale.

Witness inspected and weighed the bags and made a record of them. No one ever besides witness received mohair for his employers. Witness did not receive any bags of mohair consigned to the Massachusetts Mohair Plush Company by J. D. Crow of Uvalde,
50 Texas, March 12, 1907, nor was any mohair received from such party consigned to the Massachusetts Mohair Plush Company during the year 1907.

Witness was familiar with the market value of mohair on the market at Lowell, Massachusetts, during March, April, May and June, 1907, and was familiar with the different grades of mohair, and the market value thereof during the months mentioned at Lowell, Massachusetts. Witness was familiar with the market value of mohair shipped from Uvalde, Texas, on the market at Lowell, Massachusetts during March, April, May and June, 1907. The several grades of mohair shipped from Uvalde, Texas, to Lowell, Massachusetts during the months named, are as follows: Fine, medium and coarse. The prices for the same is as follows: Fine, 30 cents per pound, Medium 24 cents per pound, coarse 18 to 20 cents per pound.

Cross-examination:

Witness was born and raised in England, leaving there at 24 years of age. He came to United States in 1891. He worked as a wool sorter for 3 years in England. The first 5 years after coming to America he worked in the same capacity for a wool company, and then took employment with the Massachusetts Mohair Plush Company, as wool sorter and overseer, where he has been for 12 years. He was wool sorter for his present employer for 6 years, and as second-hand for 4 years and as overseer 2 years.

In the fall of 1906 and the spring of 1907, his employer employed two or three hundred persons.

This warehouse is about 20 feet distance from the factory. 90 per cent of the mohair received by his employer comes to the warehouse in cars on the switch track. About 10 per cent is brought by wagon transportation. The drays employed in such work are owned by the Stanley Transportation Company, who do teaming for most of the corporations of the city. The railroad track adjoins the warehouse. Mohair from the cars are run out by truck to scales in the warehouse, where they are weighed, inspected, recorded and stored. The same course was taken with bags delivered by wagon.

51 His employer made mohair and worsted yarn and mohair plushes for sale, and in this business used all the mohair received.

They have but one warehouse. Some wool was also received by his employers.

Witness was the only person from December 1906 to the 1st of May 1907, who handled at any time or was engaged in checking mohair received by his employers. He checked the mohair into the room as he weighed it. He inspected each bag, noting the marks thereon as it came out of the car or off the wagon. The checking was done in the warehouse. He attended to the checking of the mohair received by his employers during the time in question in person. He checked it by the letters and bills of lading which were delivered afterwards to the office in Lowell, and from there sent to the business office in Boston, and he cannot, therefore, attach them to his answers.

Witness did in person, during the time above mentioned, check in, weigh and make actual inspection of every bag of mohair received by his employers.

It is not true that during the time above referred to at intervals other persons from time to time checked in the mohair and other things received by his employer at their warehouse. It is not true that he did not in person inspect and weigh each and every bag of mohair received by his employer during the time in question; and it is not true that he did not in person inspect and weigh each bag of mohair as the same came from the drays or cars, and the actual inspection and weighing was not done in many instances by other persons.

In checking the mohair he used a writing pad or block taking down thereon the weight of each bag, and it was weighed and noted

on the block the weight and marks of indentification and compared it with the letters or invoices.

It is true that during the dates and times above referred to his employer received large quantities of mohair from Texas and other places. During the season they received the following: From Texas about 2000 bags. From New Mexico, about 330 bags. From Arizona about 200 bags. From Oregon about 50 bags. About 500 per month in the aggregate.

52 The following question was propounded and answer given:

"Q. It is true is it not that from time to time you had numbers of bags of mohair which for want of marks of identification, or because of loss of marks and tags, could not be, with absolute certainty, applied to any particular invoice and had to be arbitrarily applied on some invoice as best you could?

A. Yes, at times it is difficult to identify bags because of lack of marks of identification. Sometimes they were credited to an invoice upon supposition."

It is true that from time to time his employers had a lot of bags of mohair on hand which could not with absolute certainty be designated as belonging to any particular consignment. It is true that at the end of the receiving season of that year, and at some time during that year, his employers had on hand a number of bags of mohair, the ownership or identity of which was never with certainty located, and for that reason was never applied on any shipment or never was arbitrarily applied. About 10 bags was never applied to any invoice. They are still in the warehouse awaiting orders from the railroad from which they were received as to what shall be done with them. It is true that on many occasions a week or a month, or even greater time would elapse before these bags of doubtful identity would be applied on invoices. About a dozen bags of doubtful identity were received by his employer during that season. They were finally identified and applied on different invoices. Where an order was given and it fell short, and for instance a bag without marks of identification corresponded in quality and weight with the stock order, wherein there was a deficiency, it was credited to that shipment because of the agreements in the respects stated. In some cases 4 or 5 weeks elapsed before the question of identity was finally settled. The witness in most instances attended to the establishment of the identity of the bags of mohair with the several consignments, and sometimes in doubtful cases the superintendent assisted

53 him. This was one in the wool shop. The witness cannot give the particulars of each instance, because they are forgotten. The time after arrival of the mohair within which this was done was sometimes 3 or 4 weeks. There are delays, and sometimes lengthy delays in the arrival of parts of shipments. Two months is the extreme limit of such delays. This length seldom occurs.

The railroads by which his employers receive mohair are the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad, both use the same switches and have trackage facilities to his employer's warehouse. Such mohair as is not delivered in cars

comes by wagon and is hauled about half a mile. About 10 per cent of it is delivered by wagon, and the remainder by cars.

The checking was done by witness in the warehouse.

Witness has been engaged 4 or 5 years in the purchase and sale of mohair for the Massachusetts Mohair Plush Company at Lowell, Massachusetts.

There are many grades of mohair, fine, medium, coarse, long and short, clear and kempy.

The wool sorters at his employer's mill make about 14 different grades of mohair. Witness cannot give the commercial names of the different grades and the difference in value between the several grades.

It is true that the length and fineness of the fiber, as well as dirt, burs and color have much to do with the class and grade of mohair. And it is true that a great many things have to be considered to determine the grade of mohair, and that no man can grade it without seeing it and giving it a personal examination.

From foreign countries his employer received about 800 bags of mohair. This was Turkish mohair from Turkey.

Witness has refreshed his memory in this matter from his receiving book in his possession in Lowell, Massachusetts. It is a bulky book and used continually in the business of his employers, and he cannot attach to his answers the book or a copy thereof
54 for the reasons stated.

Plaintiff closes.

Defendant offered in evidence the testimony in the form of deposition of George Alter taken in the City of New York, on the 10th of June 1908; also the testimony of H. Thompson and Thomas R. Belden taken at San Antonio, Texas, September 12, 1908, and the testimony of F. M. Hasselmeir taken in Galveston, Texas, September — 1908, for the purpose of proving that defendant delivered the mohair in question to the Morgan Line of Steamships at Galveston, Texas; and for the purpose of showing delivery by that Company in New York of the mohair in question to the Metropolitan Steamship Company, a common carrier by water between New York and Massachusetts points, all of which was excluded by the court upon objection of plaintiff, and exceptions saved by defendant.

Defendant closes.

We hereby agree that the within and foregoing statement is a true and correct statement of all the facts introduced in evidence at the trial of this cause, and that the same, after having the approval of the court, shall be filed and made a part of the record, and shall be transmitted to the Court of Civil Appeals, as provided by law, and there accepted and acted upon as the statement of facts in this case.

T. M. MILAN,
Attorney for Plaintiff.
W. B. TEAGARDEN,
G. B. FENLEY,
Attorneys for Defendant.

55 The foregoing statement of facts having been agreed to by the parties, was this day submitted to me for inspection and approval, and after examination of the same, the same is found by me to be correct, and is, therefore, now approved and the Clerk of this Court is hereby ordered to file the same and make it a part of the record of this cause, and to transmit it in its original form under his certificate and seal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, along with the transcript in this case, as provided by law.

This October 12th, 1908.

W. D. LOVE,
County Judge, Uvalde County, Texas.

Pending in County Court, Uvalde County, Texas.

No. 460.

J. D. CROW
vs.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

I, Zena Dalrymple, Clerk of the County Court in and for Uvalde County, Texas, do hereby certify that the above and foregoing 12 pages is the original statement of facts filed in this cause, and approved by the Court, and the same which I have been directed to certify to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, along with the record in this cause on appeal.

Given under my hand and seal of office, this 23 day of November, 1908.

[SEAL.] ZENA DALRYMPLE,
County Clerk, Uvalde County, Tex.

Endorsed: No. 4127. J. D. Crow vs. G. H. & S. A. Ry.—Statement of Facts—Filed 12/15/08—Zena Dalrymple, Clerk. Filed in the Court of Civil Appeals, at San Antonio, Texas, January 12, 1909. Jos. Murray, Clerk.

56 *Opinion.* (*Filed* 2/24/09.)

No. 4127.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
J. D. CROW, Appellee.

Appeal from Uvalde County.

This is a suit for the value of three and a half bags of mohair delivered by appellee to appellant at Uvalde, Texas, for shipment to a consignee at Lowell, Massachusetts. Appellant alleged, among

other things, a contract between it and appellee by which its liability was limited to its own line, and attacked the constitutionality of the amendment, of 1906, to the interstate commerce act. A demurrer was sustained to that part of the answer and a trial by jury resulted in a verdict and judgment for appellee in the sum of $241.91.

The property was delivered to appellant by appellee for transportation from Uvalde, Texas, to Lowell, Massachusetts, and was not delivered there, to appellee's loss in the sum found by the jury.

The first nine assignments of error present the points that only Federal Courts have jurisdiction of claims for damages for non-delivery of freight when it is an inter-state shipment, and that the Federal Act of 1906 (U. S. Comp. St. Supp. 1907, p. 909) is unconstitutional, because it invades the sovereignty of the States, and is violative of the fourteen amendment of the Federal Constitution and section 19, Article 1 of the State Constitution. All of these points have been fully considered by this court in the case of Railway v. Piper, 115 S. W. 107, and decided adversely to the contentions of appellant, and we adhere to that decision.

The evidence was positive that appellant did not deliver to the consignee the mohair shipped by appellee, and it follows that
57 there is no merit in the contention that the evidence failed to show that the mohair in question was not delivered to the consignee. The receiving clerk of the consignee, the Mohair Plush Company, stated: "Witness inspected and weighed the bags and made a record of them. No one ever, besides witness, received mohair for his employers. Witness did not receive any bags of mohair consigned to the Massachusetts Mohair Plush Company by J. D. Crow of Uvalde, Texas, shipped from Uvalde, Texas, March 12, 1907, nor was any mohair received from such party consigned to the Massachusetts Mohair Plush Company during the year 1907." It is true that the record shows that appellee sent the mohair to Uvalde on March 11, 1908, for shipment, but in connection with his testimony a bill of lading was offered in evidence which showed that the shipment was made on March 12, 1907, the date on which appellee alleged that it was shipped, and which was also alleged by appellant.

It is true that the receiving clerk swore that at the end of the season of 1907 there were about ten unidentified bags of mohair remaining in the warehouse subject to the order of the railroad. The consignee had no power to arbitrarily apply a portion of the unidentified mohair to appellee's account. It was appellant's duty to deliver appellee's property to the consignee in such condition that it could be identified by the consignee.

The judgment is affirmed.

W. S. FLY,
Associate Justice.

Endorsed: 4127. Galveston, Harrisburg & S. A. R. R. Co., Appellant, vs. J. D. Crow, Appellee. From Uvalde County. Opinion by W. S. Fly, Associate Justice. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 24, 1909. Jos. Murray, Clerk. Filed in Supreme Court Apr. 24, 1909. F. T. Connerly, Clerk.

58 *Judgment.*

WEDNESDAY, *Feb'y 24th, A. D.* 1909.

Appeal from County Court, Uvalde County.

No. 4127.

G., H. & S. A. RY. CO., Appellant,
vs.
J. D. CROW, Appellee.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee J. D. Crow, do have and recover of and from the appellant, Galveston, Harrisburg & San Antonio Railway Company and its surety, The United States Fidelity & Guaranty Company the amount adjudged by the Court below and all costs in this behalf incurred, and this decision be certified below for observance.

Appellant's Motion for Rehearing. (*Filed* 3/10/09.)

In the Court of Civil Appeals, Fourth District of Texas.

No. 4127.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
J. D. CROW, Appellee.

Appeal from County Court, Uvalde County, Texas.

Appellant's Motion for Rehearing.

59 Now comes appellant and moves this Court that the judgment in this cause entered on February 24, 1909, affirming the judgment of the trial court, be reconsidered, and a rehearing granted appellant herein, for the following reasons:

First Error.

This court erred in overruling appellant's First Assignment of Error, and the propositions thereunder, said assignment and propositions reading as follows:

"First Error.

(No. 1 in the Record. Tr., p. 34.)

The court erred in overruling defendant's general demurrer, because plaintiff's petition stated no cause of action over which the court had jurisdiction. On the contrary, the cause of action stated in the petition is one created by the act of Congress of the United States of June 29th, 1906, and one which the courts of the United States and the Interstate Commerce Commission alone have jurisdiction to try.

First Proposition.

The petition stated no cause of action of which the trial court could take cognizance. It stated a cause of action based upon the act of Congress of June 29, 1906, over which the Interstate Commerce Commission and the Federal courts have exclusive jurisdiction by the terms of the law itself. Appellant's general demurrer to the petition ought, therefore, to have been sustained.

Second Proposition.

The petition stated no cause of action against appellant under any other law than that of the act of Congress of June 29th, 1906, and this being unconstitutional, the demurrer should have been sustained."

Second Error.

This court erred in overruling appellant's Second Assignment of Error, and propositions thereunder, said assignment and propositions reading as follows:

"Second Error.

(No. 2 in the Record, p. 39.)

60 The court erred in sustaining plaintiff's special exception contained in his first supplemental petition to all that part of defendant's special answer wherein it is claimed, in substance, that the mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment, whereby defendant contracted only to safely carry the mohair and deliver it to the next connecting carrier, after which its liability should cease; and wherein it is further claimed that said contract was in all respects strictly complied with, and the mohair, if lost at all, was lost by one of the connecting carriers, and not by defendant.

First Proposition.

It was error for the court to sustain appellee's special exception, and strike out appellant's special answer, because the contract therein asserted, and the compliance therewith set out in the special answer, constituted a good defense to the cause of action; and the act of Congress of June 29th, 1906, which the court followed in this ruling,

and which denies the right of a common carrier to make and defend under such a contract, and the action of the court in construing and applying said law, is violative of the fifth amendment to the Federal Constitution, in that its practical effect is to deprive appellant of its property without due process of law, and arbitrarily takes its property without just or adequate compensation.

Second Proposition.

The act of Congress of June 29th, 1906, and the interpretation and application of it by the trial court in this case, and the action of the court in striking out appellant's said answer and defenses, are also violative of the fourteenth amendment to the Federal Constitution, Section 1, in that the practical application and effect of it all is to abridge the privileges and immunities of appellant, and to deprive it of its property without due process of law, and to deny it the equal protection of the law, because it denies to appellant the right to make just and reasonable contracts for the protection of its own property and interests, such as are enjoyed by persons and corporations
61 generally. It arbitrarily levies a contribution upon appellant, without just cause or reason, and without fault or blame upon its part, to reimburse the shipper for a loss and damage caused by an entire stranger, over whom appellant has no control, without any adequate provision for appellant's protection and reimbursement, and thereby appellant is, without any just cause, deprived of its right to have, acquire, and enjoy its property, and pursue its business in a fair and just way, such as the Constitution guarantees, and as other persons and corporations are permitted to do without molestation.

Third Proposition.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas, under Articles 9 and 10 of the Federal Constitution, and is, therefore, void, and it was error for the trial court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense.

Fourth Proposition.

It was error for the court to strike out appellant's special answer and defenses on exception, as shown in this assignment of error, because the answer disclosed a valid and just defense under the law as administered in this State, and the practical effect of the action of the court, and the rule of law adopted and applied at the trial, is in violation of the Constitution of the State of Texas, Section 19 of Article 1, in that its effect is to deprive appellant of its property, privileges and immunities, without due process of the law of the land.

Third Error.

This court erred in overruling appellant's Third Assignment of Error, and proposition- thereunder, said assignment and proposition reading as follows::

"Third Error.

(No. 4 in the Record. Tr., pp. 39-40.)

62 The court erred in giving to the jury the second paragraph of the general charge, which reads as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case that the plaintiff, J. D. Crow, on or about March 12th, 1907, delivered to the defendant at Uvalde, Texas, mohair for shipment, and that the defendant received said mohair, and billed the same to the Massachusetts Mohair Plush Company, at Lowell, Mass.; and if you further believe, from a preponderance of the evidence, that said mohair so delivered by plaintiff to defendant, if any, or any part of same, was not delivered to the consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff."

First Proposition.

One of the vices of the charges is, that they make appellant liable absolutely for the safe delivery of the mohair at destination in Lowell, Massachusetts, notwithstanding a contract in writing was duly executed by the parties, whereby it was agreed that appellant should carry the mohair to the end of its own line at Galveston, Texas, only, and there deliver the mohair to its connecting carrier, after which its duties and liabilities should entirely cease, the undisputed facts being that appellant did not agree to carry the mohair, or to become liable for loss or damage thereto, beyond its own line, and the charges are, therefore, incorrect statements of the rule of law, because, under the undisputed facts, appellant was, under the law, not liable for any loss or damage not occurring upon its own line.

Second Proposition.

The rule of law applied and given by the court in this charge is that of the act of Congress of June 29th, 1906, the practical effect of which—and of the theory and action of the court in enforcing same against appellant—is to deprive appellant of its property without due process of law, and to arbitrarily take its property for no just cause or fault, and bestow it upon another, without compensation to appellant, and to deprive it of the right and privilege to
63 acquire, use and enjoy property, make just and reasonable contracts in the prosecution of its business, and for the preservation of its property and rights, as other persons and corporations may do, and the said law, and the action of the court, is therefore in violation of the fifth amendment to the Constitution of the United States, and of Section 19, Article 1, of the Constitution of the State of Texas.

Fourth Error.

This court erred in overruling appellant's Fourth Assignment of Error, and propositions thereunder, said assignment and proposition being as follows:

"Fourth Error.

(No. 5 in the Record. Tr., p. 40.)

The court erred in giving to the jury the first paragraph of the main charge, which reads as follows:

"You are instructed by the court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and, as such common carrier, is liable to any person from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration, and bills the same from a point in one State to a point in the same or any other State of this Union, for any damage to or loss of such freight, while being so transported, not caused by the act of God or at hands of public enemy."

First Proposition.

One of the vices of the charges is, that they make appellant liable absolutely for the safe delivery of the mohair at destination in Lowell, Massachusetts, notwithstanding a contract in writing was duly executed by the parties, whereby it was agreed that appellant should carry the mohair to the end of its own line at Galveston, Texas, only, and there deliver the mohair to its connecting carrier, after which its duties and liabilities should entirely cease, the undisputed facts being that appellant did not agree to carry
64 the mohair, or to become liable for loss or damage thereto, beyond its own line, and the charges are, therefore, incorrect statement of the rule of law, because, under the undisputed facts, appellant was, under the law, not liable for any loss or damage not occurring upon its own line.

Second Proposition.

The rule of law applied and given by the court in this charge is that of the act of Congress of June 29th, 1906, the practical effect of which—and of the theory and action of the court in enforcing same against appellant—is to deprive appellant of its property without due process of law, and to arbitrarily take its property for no just cause or fault, and bestow upon another, without compensation to appellant, and to deprive of the right and privilege to acquire, use and enjoy property, make just and reasonable contracts in the prosecution of its business, and for the preservation of its property and rights, as other persons and corporations may do, and the said law, and the action of the court, is therefore in violation of the fifth amendment to the Constitution of the United States, and of Section 19, Article 1, of the Constitution of the State of Texas."

Fifth Error.

This court erred in overruling appellant's Fifth Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Fifth Error.

(No. 3 in the Record, p. 39.)

The court erred in excluding from the jury that portion of the contract of shipment offered in evidence by defendant which reads as follows:

'It is expressly stipulated, as a condition precedent to the issuance of this through bill of lading and guarantee of through rate, that the liability of the said Galveston, Harrisburg & San Antonio Railway Company is limited to its own line, and shall cease and determine upon delivery to a connecting and common carrier of the articles herein mentioned, and in case of loss, damage or injury to any of said articles, that carrier alone shall be liable in whose (actual) custody said articles were, at the time of such loss, damage or injury.'

All of which more fully appears in defendant's bill of exception No. 1, which is referred to and made a part hereof.

Proposition.

This contract was in all respects lawful and reasonable, and when supported by proper proof was an ample defense to the cause of action (assuming that the act of Congress of June 29th, 1906, did not and could not, for any reason, apply), and it was error for the court to exclude it."

Sixth Error.

This court erred in overruling appellant's Sixth Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Sixth Error.

(No. 6 in the Record. Tr., p. 40.)

The court erred in excluding the testimony by deposition of the witness Thompson, to the effect that as a clerk for defendant, in March, 1907, he transferred all mohair in question, on its arrival at San Antonio, to S. P. Car No. 19,138, taking it from the car in which it was shipped from Uvalde to San Antonio, and it was forwarded to Houston in the former car, all of which more fully appears in defendant's bill of exception No. 4, which is referred to and made a part hereof.

Proposition.

The testimony of this witness, so offered, was material and pertinent, and, along with the testimony of Thomas Belden, F. M. Hasselmeyer and George Alter, tended to make a complete chain of testimony, showing that the mohair in question was promptly and safely delivered by appellant at Galveston to the next connecting
66 carrier, in full compliance with its contract, which delivery constituted a complete release from further liability under the contract."

Seventh Error.

This court erred in overruling appellant's Seventh Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Seventh Error.

(No. 7 in the Record. Tr., pp. 40-41.)

The court erred in excluding the testimony of defendant's witness Belden, to the effect that, as an employé of defendant at San Antonio, he examined and broke the seals of the car containing plaintiff's mohair on its arrival at San Antonio from Uvalde in March, 1907; that the Uvalde seals were intact on its arrival at San Antonio; also that the mohair was transferred into S. P. car No. 19,183, and this car was sealed immediately when loaded, all of which more fully appears in defendant's bill of exception No. 5, which is referred to and made a part hereof.

Proposition.

Belden's excluded testimony corroborated that of three other witnesses, by showing that the mohair in question was transferred to a certain car at San Antonio, on its way to Galveston, the same car from which another witness took it and delivered it to the next connecting carrier, in compliance with the contract. This testimony was, therefore, material to show compliance with the contract, which was in law an ample defense to the suit."

Eighth Error.

This court erred in overruling appellant's Eighth Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Eighth Error.

(No. 8 in the Record. Tr., p. 41.)

The court erred in excluding the testimony of defendant's witness, Hasselmeyer, to the effect that, as an employé of the
67 Morgan Line of steamships at the docks at Galveston, Texas, he checked a shipment of twenty-four bags of mohair out of

S. P. car No. 19,183 into steamship El Norte, on its trip No. 140 to New York, March 24th, 1907, all of which more particularly appears in defendant's bill of exception No. 6, which is referred to and made a part hereof.

Proposition.

The proposed testimony by Hasselmeyer was by deposition, and showed that, as the checking clerk for the Morgan Line of Steamships at Galveston, Texas, according to his check slip, he checked twenty-four bags of mohair on March 24th, 1907, out of S. P. car No. 19,183, into steamship El Norte, on her trip No. 140 to New York, which testimony, in connection with that of Thompson and Belden, of San Antonio, and Alter, of New York, formed a complete chain of evidence, showing delivery of the mohair to the connecting carrier at Galveston, and complete compliance with the contract. The testimony was, therefore, material, and it was error to exclude it."

Ninth Error.

The court erred in overruling appellant's Ninth Assignment of Error, and proposition thereunder, said assignment and proposition reading as follows:

"Ninth Error.

(No. 9 in the Record. Tr., p. 41.)

The court erred in excluding the testimony of defendant's witness Alter, to the effect that the Morgan Line steamship El Norte conveyed to New York, on its trip No. 140, the identical mohair sued for by plaintiff, and as the agent for said Morgan Line he transferred it all in good order to the Metropolitan Steamship Company, the next connecting carrier, for further transportation on the route to destination, taking receipts therefor, all of which more particularly appears in defendant's bill of exception No. 7, which is referred to and made a part hereof.

Proposition.

The testimony of the witness Alter was by deposition,
68 and to the effect that as the agent of the Morgan Line of steamships at New York he transferred from their ship El Norte, on her one hundred and fortieth trip from Galveston to New York, the identical mohair in question in this suit, and delivered same in good order to the Metropolitan Steamship Company, at the latter place, to be carried forward to destination, which testimony, under the law and contract, constituted a complete defense, and it was, therefore, error to exclude it."

Tenth Error.

This court erred in overruling appellant's Tenth Assignment of Error, submitted as a proposition, said assignment reading as follows:

"Tenth Error.

(No. 10 in the Record. Tr., pp. 41-42.)

The court erred in overruling defendant's motion for a new trial, because the verdict and judgment are contrary to law, without any facts to support them, or, at least, against the overwhelming weight of the facts, in this:

Plaintiff wholly failed to show that the mohair in question was not actually delivered to the consignees at destination. On the contrary, the undisputed facts show that for many months after time for the mohair to arrive, the consignees had a number of bags of mohair—more than plaintiff lost—which had been by the carriers delivered to them, and which they had not identified and applied to any shipments because the marks had become obliterated or defaced, which unclaimed mohair was still in the hands of consignee at the time of trial, and part of it, no doubt, is the mohair in question.

And it further appears that the consignees have arbitrarily applied bags of mohair in many instances to shipments when, because of defaced marks, this was mere guesswork; and it is reasonably certain that plaintiff's mohair was thus disposed of by the consignees, if it is not in fact now in their possession, in the form
69 of the numerous unidentified bags held by them.

This assignment of error, being itself in the nature of a proposition, is submitted as such."

We would show the Court, that J. D. Crow, appellee, and T. M. Milam, upon whom service of this motion, may he had, reside in Uvalde County, Texas.

In conclusion, we respectfully pray that this court reconsider this cause, and that the cause be ordered reversed and dismissed; or, if appellant is not entitled to have it reversed and dismissed, that it be ordered reversed and rendered; or, that if not entitled to have it reversed and rendered, that it be ordered reversd and remanded.

BAKER, BOTTS,
PARKER & GARWOOD,
W. B. TEAGARDEN &
G. B. FENLEY,
Attorneys for Appellant, G., H. & S. A. Ry. Co.

Endorsed: No. 4127. Galveston, Harrisburg & San Antonio Ry. Co., Appellant, vs. J. D. Crow, Appellee. In the Court of Civil Appeals 4th District of Texas. Motion for Rehearing by appellant. Filed in the Court of Civil Appeals, at San Antonio, Texas, Mar. 10. 1909. Jos. Murray, Clerk. Filed in Supreme Court Apr. 24, 1909. F. T. Connerly, Clerk.

Order Overruling Motion for Rehearing. (3/24/09.)

No. 4127.

G., H. & S. A. Ry. Co., Appellant,
vs.
J. D. Crow, Appellee.

Appeal from Uvalde.

The motion of appellant for a rehaing filed M'ch 10" 1909 coming on to be heard and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled;
it is further ordered that appellant Galveston, Harrisburg
70 & San Antonio Railway Company and its surety, The United States Fidelity & Guaranty Company pay all costs of this motion.

71 In the Supreme Court of Texas.

No. —.

Galveston, Harrisburg & San Antonio Railway Company,
Plaintiff in Error,
versus.
J. D. Crow, Defendant in Error.

Petition for Writ of Error to the Fourth Supreme Judicial District of Texas.

To the Honorable Supreme Court of the State of Texas:

Your petitioner, the Galveston, Harrisburg & San Antonio Railway Company, respectfully represents that in a certain cause, pending on appeal in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, to wit, No. 4127, Galveston, Harrisburg & San Antonio Railway Co., appellant, versus J. D. Crow, appellee, on appeal from the County Court of Uvalde County, Texas, the judgment of the trial court, from which your petitioner appealed, was, on February 24th, 1908, in all things affirmed by said Court of Civil Appeals, in which action and proceedings said Court of Civil Appeals committed manifest errors, to the prejudice of your petitioner, and it now hereby applies to this Honorable Court for a writ of error to said Court of Civil Appeals, to the end that said cause may be brought here for revision; and for grounds to sustain this petition respectfully shows to the court:

J. D. Crow, defendant in error, and T. M. Milam, Esq. his attorney of record, both reside in Uvalde County, Texas.

Statement of the Case.

For want of a sufficient statement of the issues and facts in the opinion of the Court of Civil Appeals, it will be necessary to here submit, at some length, the issues and proceedings.

72 This suit was filed by defendant in error in the County Court of Uvalde County, Texas, for the sum of $236.10, the alleged value of certain mohair alleged to have been delivered by him to defendant in error at Uvalde, Texas, for shipment to a designated consignee at Lowell, in the State of Massachusetts, and which mohair, in the contract at the time executed plaintiff in error "agreed and undertook to transport from Uvalde, Texas, over its own line to Galveston, Texas, and forward the same thence over its connecting lines to Lowell, Massachusetts, for delivery, the said mohair in good condition, to the said Massachusetts Mohair Plush Co., at said Lowell, Mass." And the further charges that, "in violation of the terms of its contract, as aforesaid, defendant has wholly failed and neglected to deliver," to the said consignees at Lowell, Mass., the said mohair, or any part thereof to his damage, etc. (Tr. p. 2.)

Plaintiff in error filed and urged a general demurrer, special exceptions, and general denial, and by special answer alleged that, as a matter of fact, the shipment was accepted and carried under a written contract duly executed by plaintiff, by the terms of which plaintiff in error agreed to carry the property only to Galveston, Texas, the end of its line, and there deliver the same to its next connecting carrier for consignee's account, and that after such delivery its liability should cease, and that it was, in effect, expressly stipulated in the contract that plaintiff in error should not be liable for any loss or damage not occurring upon its own line. (The contract, which was conceded in open court to be the true contract (Tr. p. 14), was set out in full in the answer. Numerous stipulations are unimportant. The stipulations that apply appear on page 4 and top of page 5 of the Transcript.)

73 It was alleged by plaintiff in error that it promptly delivered the property, without loss or damage, to its next connecting carrier at Galveston, as it had agreed to do, and that that carrier, in turn, promptly, and without loss or damage, transported same to New York, and there delivered it to the next succeeding carrier in good order and condition, and that in like manner this carrier delivered it in good order to the last carrier, to be delivered to the consignee, all carriers being named. And plaintiff in error charged, in effect, that the act of Congress of June, 1906, under which the suit was being prosecuted, and the enforcement of the same under the facts and pleadings, would deprive it of its property and its right to contract and to acquire and use property, for private use of the shipper, without compensation and without due process of law, and it would deny it the equal protection of the law, and that it is, therefore, violative of the Fifth and Fourteenth Amendments to the Federal Constitution, and of Section 19, Art. 1, of the Constitution of Texas, also, that the act is in

violation of Articles 9 and 10 of the Federal Constitution, in that it invades the reserved rights and the special prerogative of the legislatures of the several states. (Tr. pp. 8, 9 and 10.)

To this answer defendant in error filed a general demurrer and a special exception in the following language (caption and signature omitted):

"And specially excepting to defendant's original answer, plaintiff says that the same is insufficient, in this: That defendant pleads and sets up that, under a contract with plaintiff, it limited its liability to its own line, and that it delivered to its next succeeding carrier said mohair, and prays judgment. The plaintiff excepts to said defense as set up, on the ground that it is no defense under the law; the act of Congress called the 'railroad rate bill,' which became a law in August, 1906, under which each receiving carrier is liable for freight lost, and may recover from its connecting car-
74 rier, or the carrier who lost the goods." (Tr. p. 10, at bottom, and 11, at top.)

This exception was sustained by the court, and the entire special answer of plaintiff in error was stricken out and exception saved. (Tr. p. 22.) The exceptions, general and special, of plaintiff in error to the amended petition were overruled by the court, and exception saved. (Tr. p. 22.)

Plaintiff offered in evidence the special stipulations in the contract asserted in the excluded answer, and on objection they were excluded and exception saved. (See bills of exception Nos. 1 and 2, Tr., pp. 25 to 28.)

Plaintiff in error offered in evidence testimony by depositions of several witnesses, showing delivery of the mohair at Galveston to its connecting carrier, and to show carriage of same to New York, and delivery there by the connecting carrier to the next succeeding carrier on the route, all of which was excluded upon the express ground for which the contract was excluded, to wit, that under the act of Congress of 1906, relied on by defendant in error, this testimony was immaterial, and constituted no defense. (See bills of exception Nos. 4, 5, 6 and 7, Tr., pp. 30 to 37.)

In the general charge the court applied the act of Congress of June 29th, 1906, and in effect instructed the jury that plaintiff in error was bound absolutely as a carrier at common law to deliver the mohair at destination, and could not defend against the action, if it received the shipment destined as described, except by showing that it was lost or destroyed by reason of an act of God or the public enemy. (See the first and second paragraphs of the court's charge, Tr. pp. 20 and 21.)

There was a trial by the court with a jury, which resulted in a verdict and judgment for defendant in error for the sum of $240.91. (Tr. p. 22.)

75 Appeal was in due time perfected to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, resulting, as before shown, on February 24th, 1909, in an affirmance of the judgment.

A motion for rehearing, embracing all the issues herein
76 insisted upon, was in due time filed in said Court of Civil Appeals, which motion was, on March 24th, 1909, in all things overruled.

Plaintiff in error respectfully shows to the court that, upon the facts above set out, and appearing in the opinion of the Court of Civil Appeals, and in the record, this court has jurisdiction to review this cause on writ of error if for no other reason, because the validity of a statute is involved.

Your petitioner respectfully shows that said Court of Civil Appeals committed errors in said cause, as follows:

First Error.

The Court of Civil Appeals erred in overruling appellant's first assignment of error, and the propositions thereunder, said assignment and propositions reading as follows:

First Error.

(No. 1 in the Record. Tr., p. 38.)

The court erred in overruling defendant's general demurrer, because plaintiff's petition stated no cause of action over which the court had jurisdiction. On the contrary, the cause of action stated in the petition is one created by the act of Congress of the United States of June 29th, 1906, and one which the courts of the United States and the Interstate Commerce Commission alone have jurisdiction to try.

First Proposition.

The petition stated no cause of action of which the trial court could take cognizance. It stated a cause of action based upon the act of Congress of June 29, 1906, over which the Interstate Commerce Commission and the Federal courts have exclusive jurisdiction by the terms of the law itself. Appellant's general demurrer to the petition ought, therefore, to have been sustained.

Statement.

Plaintiff's petition and supplemental petition invoke the act of Congress of June 29th, 1906, as the basis of his right to recover.
(See preliminary statement in this petition.)

77 The trial court construed his cause of action as one based on said act, and therefore struck out the special answer of plaintiff in error setting up a defense otherwise perfectly good, excluded the testimony to sustain the special answer, and also controlled and directed the verdict of the jury in accordance with said act. (See preliminary statement.) The case was by defendant in error and the court construed to be one based upon the act of June 29th, 1906, and the case was accordingly tried under that rule of law.

The general demurrer was submitted to the trial court and overruled. (Tr. p. 22.)

The question of jurisdiction of the trial court was submitted and fully discussed in the Court of Civil Appeals. (See appellant's brief, pp. 5 to 19.)

Authorities.

That the general rule governing jurisdiction fixed by the act of August 13, 1888 (U. S. Com. Stat. 1901, p. 508), does not control in this case, because Section 9 of the act of 1887 is special in its effect, and controls in this case, see—

In re Horst, 150 U. S., 653; 37 L. Ed., 1211; 14 Sup. Ct. Rep., 221.
U. S. v. Mooney, 116 U. S., 107; 29 L. Ed., 552.
Price v. Abbott, 17 Fed. Rep., 506.
Howard Supply Co. v. Ry., 162 Fed. R., 188.
Parsons v. Ry., 167 U. S., 455; 17 Sup. Ct. R., 887. Art 3, Sec. 2, Federal Constitution.

That the Circuit and District Courts of the United States and the Interstate Commerce Commission alone have jurisdiction over all causes of action arising under the act of Congress of 1887, and all its amendments, including the act of June 29, 1906, see—

Van Patten v. Ry., 74 Fed., 981.
G. C. & S. F. Ry. Co. v. Moore, 98 Tex., 302; 83 S. W., 362, and cases cited.
Copp. v. Ry., 43 La. Ann., 513; 26 Am. St. R., 199; 13 L. R. A., 726.
Abilene Cot. Oil Co. v. T. & P. Ry. Co., U. S., (1907); 27 Sup. Ct. Rep., 350; reversing the Texas Court of Civil Appeals in the same case, reported in the 85 S. W., 1052.
78 24 St. L., 382, Sec. 9; Fed. St. Ann., Vol. 3, p. 833, and cases cited.

Special attention is invited to the recent case of Pittsburg, C. C. & St. L. Ry. Co. v. Wood, 84 N. E., 1009 (Indiana App., 1908).

Special attention is also invited to Daish's Procedure in Interstate Commerce Cases (1909), Section 158, and cases cited.

When Congress creates a new right and provides a remedy in the Federal Courts, without mention of the State courts, jurisdiction will be exclusive in the Federal courts.

Sheldon v. Ry., 105 Fed. R., 785.
Copp. v. Ry., supra.

Prior to the passage of the act of 1906, there was no rule of law existing in Texas, or elsewhere, upon which appellee could have recovered against appellant in this case, in the face of the contract of shipment asserted in the answer.

McCarn v. Ry., 84 Tex., 352.
Moore on Carriers, pp. 457 and 458, Sec. 8, and cases cited.

The parties and the trial court having construed the cause of action stated in the pleadings to be one based upon the act of Congress

of June 29, 1906, this court is bound by that construction, if there is in fact room for doubt about it.

Blum v. Withers, 66 Tex., 350.
Ry. v. Ramey, 23 S. W. (Tex. C. A.), 442.
Ry. v. Kenedy, 9 Tex. C. A., 232.
Bronson v. Studebaker, 133 Ind., 147.
Tully v. Tranor, 53 Cal., 274.
Harwood v. Toms, 130 Mo., 225; S. W.
Drury v. Newman, 99 Mass., 256.
Lockwood v. Quackenbush, 83 N. Y., 607.
Dungan v. Reed, 167 Pa. St., 394.

Remarks.

In view of the opinion of the Court of Civil Appeals we deem it important to first discuss whether or not this suit is based upon the act of June 29, 1906. Passing for the present the question of jurisdiction of the court, we submit that had his suit been filed prior to August, 1906, and had the cause of action been stated in the language of his petition, appellant's special answer would have been a good defense to it.

There was, prior to that act, no common law or statutory
79 rule, State or Federal, whereby he could have recovered from appellant for loss or damage to his property occurring upon the line of an independent connecting carrier, in the absence of a contract by appellant to become liable, as at common law, for the safe delivery of the property at destination. Such was the condition of the law prior to August, 1906, and this is so well settled that the proposition needs only to be stated.

At the trial, appellee insisted that his right to recover rested upon the act of Congress of June 29th, 1906, and the court took that view of it, and applied that law. All parties acted upon that theory of the case, and the trial, from beginning to end, was conducted upon that theory. If anything remained that was necessary to be shown to determine this matter without doubt from the face of the original pleadings, this was supplied by appellee in his supplemental petition, wherein he expressly declares upon the act of 1906. But, if doubt still remained, this is now entirely removed by the construction placed upon the pleadings by appellee himself and the court and this is now binding upon this court.

Blum v. Withers, supra, and other cases cited.

There is a marked distinction between the case at bar and the case of G. H. & S. A. Ry. Co. v. Piper, 115 S. W., 107, in which this court denied the writ of error. In the Piper case the Court of Civil Appeals held, if we correctly understand the opinion, that the cause of action was not based upon the act of Congress of June 29th, 1906, but that the act was invoked only to fix liability holding also that the trial court had jurisdiction, in neither of which views do we concur. But, in view of the fact that the contract of carriage was alleged to have been one to carry to and deliver at destination, without exception or limitation, and the contract offered in evidence, as

found by the court, fully sustained this allegation, the affirmance of the case might well have been placed upon the ground that
80 plaintiff alleged and proved by the undisputed facts that defendant contracted to carry and deliver the property at destination, without limiting its liability, and the judgment rendered in the trial court was the only one possible under the facts—hence the errors of the trial court, in excluding the defenses, which were demonstrated to have been unfounded in fact, were not reversible errors; and we may reasonably assume that this view of that case caused this court to deny the writ of error therein.

The case at bar, as is elsewhere shown, without doubt is based upon a contract to carry only to the end of the line of plaintiff in error, and to deliver to a connecting carrier, after which all liability on its part should cease, and by reference to the excluded evidence, as shown by bills of exception referred to in the statement, ample testimony was offered to show that the contract was fully complied with.

If this suit is not based upon the Federal statue, as the Court of Civil Appeals in their opinion seem to have held, then appellant is peculiarly unfortunate, for the case was tried upon that theory, and for that reason only it was that the trial court excluded appellant's defenses based upon its contract limiting the carriage and its liability to its own line. It was conceded by the exception that the contract alleged by appellant was executed, and upon making proof of the execution of that contract and compliance therewith, as it alleged, appellant would have been entitled to an instructed verdict, had the case not been based upon the Federal statue. It is clear, from the action of the court, that such would have been the result.

In view of the language of appellee's supplemental pleading, and the action of the trial court, it would seem to be unnecessary to discuss this proposition further.

We come next to consider our contention that the cause of action asserted is one of which the State courts have no jurisdiction.
81 Attention of the court is invited to the fact that causes arising under the interstate commerce law of 1887, and its amendments, are not controlled by the Federal statute, Art. — (U. S. Comp. St. 1901, p. 508), governing jurisdiction of courts generally, because Section 9 of the former law is special in its nature, and expressly takes the cases out of the general rule. In all such cases the act which specially designates the courts in which cases shall be tried will control. In re Horst, 150 U. S., 653, and other cases cited on p. — of this brief.

Article 3, Section 2, of the Federal Constitution, is a mandatory order to Congress to provide a Federal tribunal for "all cases" arising under the Constitution and laws of the United States, and the treaties entered into by them.

Martin v. Hunter, 1 Wheaton, 328; 4 L. Ed., 103.

Within the meaning of this article the words "suits", "cause" and "action" are held to be convertible terms.

Cohens v. Virginia, 6 Wheat., 264; 5 L. Ed., 257.

In re Metzger, 17 Fed. Cases, 234.

It seems to be the settled rule of law that, when Congress creates a new right, and provides for its enforcement in the Federal courts, without also conferring jurisdiction on the State courts, such remedy is exclusive, and the State courts are without jurisdiction.

Sheldon v. Ry., 105 Fed. R., 785.
Copp. v. Ry., supra.

At the very inception of interstate commerce legislation it was thought by Congress to be more expedient to require all causes of action arising under that legislation—that is, the new rights created thereby—to be litigated in Federal tribunals, where uniformity and harmony of interpretation and application could be had. They could readily foresee the necessity of such an arrangement respecting all traffic and rate questions. In fact, it has been held that as to a rate issue, whether based upon the common law or the
82 Federal statute, the Federal jurisdiction is necessarily exclusive, and this would be true were it not so provided by the law, and notwithstanding the fact that the common law afforded a similar remedy that had been enforcible in the State courts prior to the amendment giving the Interstate Commerce Commission power to establish rates; and notwithstanding the provisions of Section 22, saving to shippers all rights pre-existing under the common law or the statutes of the several States. A conflict of decisions and jurisdiction between the State and Federal courts could not otherwise have been prevented. These propositions are clearly recognized in the cases previously cited in this brief, in the following cases:

Abilene Cotton Oil Co. v. T. & P. Ry. Co., U. S. Sup. Ct. (1907), 27 Sup. Ct. R., 350, reversing the Texas Court of Civil Appeals in the same, 85 S. W., 1052.

This rule has so far as we are aware, been applied with uniformity by the courts to the interstate commerce act of 1887, and all its amendments. We see no reason why the rule should be departed from now, with respect to the new cause of action added to the original legislation by the amendment of 1906. It is just as much a part of the original law as is Section 8, which created the bulk of the remedies available to the shipper prior to 1906. Had Congress not intended for the new right of action to be enforced in the same manner as the rights created under Section 8, the new remedies would not have been incorporated in that law as an amendment; or else a provision would have been incorporated giving the State and Federal courts concurrent jurisdiction.

The conclusion is irresistible that the act of 1887 and all its amendments, including the act of 1906, must now be regarded as one act of legislation, and one legal plan, and the remedy provided in Section 9 applies as well to the act of 1906 as it does to Section 8, or any other provision of the law.

83 The language of Section 9 is too plain and unambiguous to require resort to rules of construction. It is couched in language not one word of which can be misunderstood. That portion which is of interest here reads as follows:

"Any person or persons claiming to be damaged by any common

carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." See also Section 2 of the Elkins act, where the same purpose is manifested.

The act of 1906 made many radical changes in the body of the interstate commerce law. Much legal learning and time and pains were devoted to the task of reforming and reconstructing the law. It must therefore follow, as a matter of common sense, as well as an irrebutable legal conclusion, that Congress deliberately intended what the language declares, giving to it the commonly accepted meaning.

In the first section of the amendment the question of jurisdiction of certain offenses under the act of 1903 is referred to and provided for, and a new right is created in favor of a shipper whose business requires switching and trackage facilities; also providing the means of enforcement, and for heavy penalties.

Attention of the court is also invited to Section 5 of the act of 1906, amending and entirely reconstructing Section 16 of the act of 1887. This amendment provides for the enforcement of awards by the Commission for damages done to shippers, and also fixes heavy penalties, and provides for injunction in certain cases by the carrier against the Commission. Attention is also invited to Section 7 of the act of 1906, entirely reconstructing Section 20 of the act of 1887, and giving the right of action here asserted by appellee. In short, it is apparent from the amendment, and reconstructed
84 law, that it was the deliberate purpose of Congress to create an entire legal plan, and to give to the Federal courts exclusive jurisdiction over all the rights therein created, as well as the penal features of the law.

It is inconceivable that Section 9 would have been allowed to remain intact while so many other sections were emasculated and reconstructed, and so many new rights created, had Congress not intended to confer exclusive jurisdiction upon the Federal courts of all cases arising thereunder.

All the new provisions creating rights, imposing penalties, and providing procedure, harmonize entirely with this theory, and constitute one harmonious plan. Such in our judgment, is the effect of the decision of our Supreme Court in Ry. v. Moore, 98 Tex., 302, 83 S. W., 362, and this theory is sustained by all the cases in point. Special attention is invited to the recent case of Howard Supply Co. v. Ry., 162 Fed. R., 188, where the act of 1906 is considered also.

If the authorities cited hold, as we insist they do, that prior to the act of 1906 exclusive jurisdiction of the Federal courts over all new rights created by the act of 1887, and all its amendments, including the Elkins law of 1903—and by new rights we mean rights not

theretofore existing at common law or by State statutes—were enforcible only by the Interstate Commerce Commission and the Federal courts, then it would seem to follow, as a necessary result, that the same rule must apply to the act of 1906.

It must here be borne in mind that the act of 1887 created but few new rights available to the shippers in the form of recoverable damages, but from time to time others have been added, including the act of 1903, and yet Section 9 has remained intact, as before stated; meanwhile it has uniformly received the application by the Commission and the Federal courts for which we contend.

85 If it is now necessary or proper to give the law a new interpretation, and say that as to the right of action given in the act of 1906, the State and Federal courts have concurrent jurisdiction, the reason to justify this course must be found in the language of the new amendment. That is to say, it should somewhere appear therein that the new cause of action is not subject to the procedure and jurisdiction provided for the enforcement of all other provisions of the law. If the new act is silent on this subject, then, like the provisions of the Elkins act, upon being incorporated in the body of the chapter, it cannot be excepted from the provisions in question, except by judicial legislation; and, assuming plaintiff's cause of action to be founded upon the act of 1906, and that it is a right of action not theretofore existing, then it necessarily follows that the County Court of Uvalde County was entirely without jurisdiction to try this controversy, and the opinion of the Court of Civil Appeals is in conflict with the case of Ry. v. Moore, supra, and all other cases cited.

As we understand the opinion of the Court of Civil Appeals, in G., H. & S. A. Ry. Co. v. Piper, 115 S. W., 107, they hold that it was the intention of Congress, in Section 9 of the act of 1887, to confer exclusive jurisdiction on the Commission and the Federal courts only for infractions of the act—that is, for some disobedience of that law as it then stood. Section 8 of that act, as we have shown, contained the bulk of the rights and penalties created, but the fact has evidently been overlooked that, as often as new penalties and rights have been by amendment incorporated in that law, it has been held that Section 9 controlled the enforcement of them. Section 9 sustains an important part in a harmonious plan or scheme for the government of interstate commerce, and it would seriously disturb the plan to now say that Section 9 applies only to the rights and penalties provided in the original act, previous to being

86 amended.

Such a construction of the law cannot be correct.

It would leave us in a peculiarly unfortunate situation.

In the act of 1906, rate-making power was given the Commission. Applying this rule to complaints against carriers for charging unreasonable rates, we would probably soon find a conflict of decisions on this complicated question of rates. A State court would probably hold a rate unreasonable which the Federal courts would hold just and fair. Other conflicts and complications would undoubtedly arise

out of an attempt at a dual administration of that and other regulations of interstate commerce.

If Section 9 applies only to a part of the rights and remedies, then how are we to determine what cases we must file in the Federal courts, or before the Commission, and what cases we may file in the State courts?

If such a course was intended by Congress, it is very unfortunate that, in reforming the law in 1906 by the amendment in question, they did not make some expression of that purpose in the act, and give a classification of the causes of which the Federal courts should have exclusive jurisdiction.

A few plain words could have been employed for that purpose; just a sentence would have sufficed. It would not help the situation to say, if such a thing were permissible, that this matter was overlooked. This subject must have been in the mind of each member who took interest in the law. It could not have escaped his attention.

In the late work just published by Mr. John B. Daish, in Section 158, where this question is fully discussed, we find the following statement:

"A careful consideration of the present law and the decisions thereunder leads to the conclusion that if a plaintiff or com-
87 plainant seeks to enforce a right where the subject matter is interstate commerce, and where the right is one which has not been either reiterated, modified or denied by the act to regulate commerce, the State and Federal courts have concurrent jurisdiction of the case, subject, of course, to the jurisdiction of the parties. If, however, one desires to enforce a right found within the act to regulate commerce, jurisdiction of the case, subject, of course, to the jurisdiction of the parties. If, however, one desires to enforce a right found within the act to regulate commerce, jurisdiction to hear and determine the matter is exclusive in the Federal courts, except in a proceeding brought under Sections 8 and 9 for damages, in which event the Interstate Commerce Commission has concurrent jurisdiction."

It needs only to be stated, in conclusion, that if the County Court was without jurisdiction, the Court of Civil Appeals had no authority to enter any judgment except one annulling the illegal judgment and dismissing the case, with judgment for costs.

Wadsworth v. Chick, 55 Tex., 24.
Temmons v. Bonner, 58 Tex., 562.
Roy v. Whitaker 50 S. W., 498.
McMahan v. City Bank, 61 S. W., 953.

Second Proposition.

The petition stated no cause of action against appellant under any other law than the act of Congress of June 29th, 1906, and this being unconstitutional, the demurrer should have been sustained.

Statement.

Same as the preliminary statement, pages 2 to 6 of this brief, and that submitted under the next preceding proposition.

Plaintiff alleges a contract to carry only to Galveston, Texas, and to there forward the mohair by connecting carrier to destination (see petition, Tr., p. 2), but nowhere charges that his loss and damage was due to any fault or negligence on the part of appellant, except in a legal conclusion that appellant violated its contract, in that it did not deliver at destination, whereas the contract alleged by him is one to carry only to Galveston, and there to forward same to destination. In other words, there to act as forwarding agent.
88 (See entire petition, Tr., pp. 2 and 3.) The general demurrer was overruled by the court, and exception saved. (Tr. p. 22, at top.)

Authorities.

That the petition states no cause of action if the act of Congress does not apply, see:

Ry. v. Jackson & Edwards, 89 S. W., 968.
McCarn v. Ry., 84 Tex., 352, and cases cited.
Moore on Carriers, pp. 457, 462.
2 Parsons Cont., 7th Ed., 227.

Since the issue here raised is fully presented in the succeeding specifications of error, the authorities and remarks there submitted are referred to.

In presenting this case in the Court of Civil Appeals, out of an abundance of caution, appellant's criticisms of the act of Congress upon which the suit is based were submitted in several separate assignments and propositions, all being identical, however, in legal effect. The real substance of the criticisms raised in all said assignments is, that the act violates the Fifth and Fourteenth Amendments to the Federal Constitution, and to Section 19, Article 1, of the State Constitution, *and to Section 19, Article 1, of the State Constitution* because, in effect, it arbitrarily and without just cause takes the property of one carrier, to pay the shipper for loss and damage due to the wrong of a stranger, which is not due process of law, and which denies defendant in such cases the equal protection of the law.

It is also contended that, under guise of regulating interstate commerce, the act invades the reserved rights and legislative prerogative of the several States, and therefore violates Articles 9 and 10 of the Federal Constitution.

Your petitioner now contends that the Court of Civil Appeals committed error in refusing to sustain the several assignments of error, presenting objections to the act of Congress, as above
89 indicated, and for the purpose of facilitating the labors, of the court, so many of the assignments of error as are deemed necessary will be here submitted in a group, with appropriate statements and authorities, concluding with a discussion of the propositions and authorities. The main issues will be separately discussed under appropriate head lines.

Second Error.

The Court of Civil Appeals erred in overruling appellant's second assignment of error and propositions thereunder, said assignment and propositions reading as follows:

Second Error.

(No. 2 in the Record, p. 39.)

The court erred in sustaining Plaintiff's special exception, contained in his first supplemental petition, to all that part of defendana's special answer wherein it is claimed in substance, that the mohair in question was shipped under a contract between plaintiff and defendant, duly executed at the time of the shipment, whereby defendant contracted only to safely carry the mohair and deliver it to the next connecting carrier, after which its liability should cease; and wherein it is further claimed that said contract was in all respects strictly complied with, and the mohair, if lost at all, was lost by one of the connecting carriers, and not by defendant.

First Proposition.

It was error for the court to sustain appellee's special exception, and strike out appellanat's special answer, because the contract therein asserted, and the compliance therewith set out in the special answer, constituted a good defense to the cause of action; and the act of Congress of June 29th, 1906, which the court followed in this ruling, and which denies the right of a common carrier to make and defend under such a contract, and the action of the court in construing and applying said law, is violative of the Fifth Amendment to the Federal Constitution, in that its practical effect is to deprive appellant of its property without due process of law, and arbitrarily takes its property without just or adequate compensation.

90 Statement.

Appellant's special answer contains a copy of the shipping contract, and alleges full compliance therewith by delivering the mohair to its next connecting carrier at Galveston. It charges also, that that carrier transported the mohair safely and promptly to New York City, and there delivered it to the next connecting carrier, which carrier in turn transported it safely, and delivered it to the last connecting carrier. It charges, also that the act of Congress of June 29th, 1906, upon which appellee relies, is violative of the State and Federal Constitutions, for various reasons therein set out, in so far as it attempts to make the initial carrier absolutely liable for the safe carriage and delivery of interstate shipments beyond its own line, being itself blameless, and in so far as it denies to the carrier the right to contract against liability beyond its own line.

That the contract was one to carry to Galveston only, and there deliver to its connecting carrier, after which appellant's liability

should cease. (See the contract Tr., p. 4, and paragraph No. 1, Tr., p. 4, at bottom, including four lines on top of p. 5.) This is the part of the contract material to this proposition. (See p. 8 of the Transcript, from middle to bottom, the allegation showing compliance with the contract.) On pages 9 and 10 (beginning at the bottom of p. 8) are the allegations attacking the constitutionality of the act of Congress of June 29th, 1906, for the reasons that its effect is:

(1) To take the property of defendant without compensation, without due process of law, and without just or lawful cause.

(2) It deprives defendant of the equal protection of the
91 law. It is denied the right to contract and to have and enjoy property and the benefits of its contracts, as other persons and corporations may.

(3) It is an invasion of the exclusive legislative prerogative of the States. It levies an arbitrary penalty or contribution upon residents of Texas, who are without blame, for the private use and benefit of another citizen of the State, for the purpose of reimbursing him for the negligence and wrong done him by a third person, outside of the State, an entire stranger to the one so penalized, without affording any adequate redress for the one so from whom the penalty is exacted, the effect of which may be so burdensome as to absorb the property and revenues of the local carrier, and destroy its power to operate its business and discharge its public duties to the State and its people imposed by the laws of the State, and thereby, in effect, confiscate its property.

The exception to the special answer reads as follows:

"Comes now the plaintiff in the above entitled and numbered cause, and files this, his first supplemental petition in answer to defendant's amended original answer, filed herein on the 22nd day of September, A. D., 1908, and says:

"That he excepts generally to said answer, and says that the same shows no defense in law to the matters alleged in plaintiff's petition, wherefore he prays the judgment of the court.

T. M. MILAM,
"Attorney for Plaintiff."

The general and special exceptions were sustained, because they stated no defense, and the entire special answer was stricken out, to which ruling exception was saved. (See the judgment Tr., p. 22, middle.)

Second Proposition.

The act of Congress of June 29th, 1906, and the interpretation and application of it by the trial court in this case, and the
92 action of the court in striking out appellant's said answer and defenses, are also violative of the Fourteenth Amendment to the Federal Constitution, Section 1, in that the practical application and effect of it all is to abridge the privileges and immunities of appellant, and to deprive it of its property without due process of law, and to deny it the equal protection of the law, because it denies to appellant the right to make just and reasonable contracts for the

protection of its own property and interests, such as are enjoyed by persons and corporations generally. It arbitrarily levies a contribution upon appellant, without just cause or reason, and without fault or blame upon its part, to reimburse the shipper for a loss and damage caused by an entire stranger, over whom appellant has no control, without any adequate provision for appellant's protection and reimbursement, and thereby appellant is, without any just cause, deprived of its right to have, acquire and enjoy its property and pursue its business in a fair and just way, such as the Constitution guarantees, and as other persons and corporations are permitted to do without molestation.

Third Proposition.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas, under Articles 9 and 10 of the Federal Constitution, and is, therefore, void, and it was error for the trial court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense.

Fourth Proposition.

It was error for the court to strike out appellant's special answer and defenses on exception, as shown in this assignment of error, because the answer disclosed a valid and just defense under the law as administered in this State, and the practical effect of the
93 action of the court, and the rule of law adopted and applied at the trial is in violation of the Constitution of the State of Texas, Section 19 of Article 1, in that its effect is to deprive appellant of its property, privileges and immunities, without due process of the law of the land.

Third Error.

The Court of Civil Appeals erred in overruling appellant's third assignment of error, and proposition thereunder, said assignment and proposition reading as follows:

Third Error.

(No. 4 in the Record, Tr., pp. 39-40.)

The court erred in giving to the jury the second paragraph of the general charge, which reads as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case that the plaintiff J. D. Crow, on or about March 12th, 1907, delivered to the defendant at Uvalde, Texas, mohair for shipment, and that the defendant received said mohair, and billed the same to the Massachusetts Mohair Plush Company, at Lowell, Mass.; and if you further believe from a preponderance of the evidence, that said mohair so delivered by plaintiff

to defendant, if any, or any part of same, was not delivered to the consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff."

First Proposition.

One of the vices of the charge is, that they make appellant liable absolutely for the safe delivery of the mohair at destination in Lowell, Massachusetts, notwithstanding a contract in writing was duly executed by the parties, whereby it was agreed that appellant should carry the mohair to the end of its own line at Galveston, Texas, only, and there deliver the mohair to its connecting carrier, after which its duties and liabilities should entirely cease, the undisputed facts being that appellant did not agree to carry the mohair, or to become liable for loss or damage thereto, beyond its own line, and the charges are, therefore, incorrect statements of the rule of law, because, under the undisputed facts, appellant was, under the law, not liable for any loss or damage not occurring upon
94 its own line.

Statement.

The charge was given in the exact language quoted. (See tr. p. 20.)

Second Proposition.

The rule of law applied and given by the court in this charge is that of the act of Congress of June 29th, 1906, the practical effect of which and of the theory and action of the court in enforcing same against appellant—is to deprive appellant of its property without due process of law, and to arbitrarily take its property for no just cause or fault, and bestow it upon another, without compensation to appellant, and to deprive it of the right and privilege to acquire, use and enjoy property, make just and reasonable contracts in the prosecution of its business, and for the preservation of its property and rights, as other persons and corporations may do, and the said law, and the action of the court, is therefore in violation of the Fifth Amendment to the Constitution of the United States, and of Section 19, Article 1, of the Constitution of the State of Texas.

Fourth Error.

The Court of Civil Appeals erred in overruling appellant's fourth assignment of error and propositions thereunder said assignment and propositions being as follows:

Fourth Error.

(No. 5 in the Record, Tr., p. 20.)

The court erred in giving to the jury the first paragraph of the main charge, which reads as follows:

"You are instructed by the court that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a

common carrier, and, as such common carrier, is liable to any person from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration, and bills the same from a point in one State to a point in the same or any other State of this Union, for any damage to or loss of such freight, while being so transported, not caused by the act of God or at hands of public enemy."

95 Statement.

The charge was given in the language quoted. (See Tr. p. 20.)

First Proposition.

One of the vices of the charges is, that they make appellant liable absolutely for the safe delivery of the mohair at destination in Lowell, Massachusetts, notwithstanding a contract in writing was duly executed by the parties, whereby it was agreed that appellant should carry the mohair to the end of its own line at Galveston, Texas, only, and there deliver the mohair to its connecting carrier, after which its duties and liabilities should entirely cease, the undisputed facts being that appellant did not agree to carry the mohair, or to become liable for loss or damage thereto, beyond its own line, and the charges are therefore, incorrect statements of the rule of law, because under the undisputed facts, appellant was, under the law, not liable for any loss or damage not occurring upon its own line.

Second Proposition.

The rule of law applied and given by the court in this charge is that of the act of Congress of June 29th, 1906, the practical effect of which—and of the theory and action of the court in enforcing same against appellant—is to deprive appellant of its property without due process of law, and to arbitrarily take its property for no just cause or fault, and bestow it upon another, without compensation to appellant, and to deprive it of the right and privilege to acquire, use and enjoy property, make just and reasonable contracts in the prosecution of its business, and for the preservation of its property and rights, as other persons and corporations may do, and the said law, and the action of the court, is therefore, in violation of the Fifth Amendment to the Constitution of the United States,
96 and of Section 19, Article 1, of the Constitution of the State of Texas."

Statement.

For additional statement under this group of specifications of error the court is referred to the preliminary statement of the case on the first pages of this petition.

Authorities.

On the constitutionality of the act of Congress, see:
5th and 14th Amendments to U. S. Constitution.
T. & P. Ry. v. Lynch, 97 Tex., 25.
Reagan v. Farmers Loan & Trust Co., 154 U. S., 420.
Central of Ga. Ry. Co. v. Murphy 196 U. S., 194; 25 Sup. Ct. Rep., 218.
Venning v. Ry. (S. C.), 49 Am. & Eng. R. R. Cases, New Series, 673 and 674; 38 S. E., 983; 12 L. R. A. (N. S.), 1217.
Ry. v. Tobacco Co., 169 U. S., 311; 18 Sup. Ct. Rep., 335.
Munn v. Ill., 94 U. S., 113.
Yeck Wo v. Hopkins, 118 U. S., 356.
Adair v. U. S., 28 Sup. Ct. Rep., 277 (not yet officially reported).
Jacobson v. Massachusetts, 197 U. S., 11; 25 Sup. Ct. Rep., 358-362.
Lochner v. N. Y., 198 U. S., 45; 25 Sup. Ct. Rep., 539-543, and cases cited.
Gibbons v. Ogden, 9 Wheat, 1, 196; 6 L. Ed., 23, 70.
Champion v. Ames, 188 U. S., 321; 23 Sup. Ct. Rep., 321.
Holden v. Hardy, 169 U. S., 366.
Allgeyer v. Louisiana, 165 U. S., 578; 17 Sup. Ct. Rep., 427.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Mugler v. Kansas, 123 U. S., 623.
Ry. v. Smith, 173 U. S., 684.

That appellant's special answer showed a perfect defense in the absence of the act of Congress in question, see:
McCarn v. Ry. 84 Tex., 352, and cases cited.
Jackson & Edwards v. Ry. 89 S. W., 968.
2 Parsons on Cont., 9th Ed., 227.
Moore on Carriers, 457-462, Sec. 8.

Argument.

The act of Congress of June 29th, 1906, in so far as it attempts to compel the initial carrier to accept interstate shipments of property, and to deliver them at destination in another State at his peril, holding him liable as at common law for the performance of such service absolutely, and for any loss or damage resulting, even upon the line of a connecting carrier over whom he has no control—if this is the proper interpretation of it — is not a proper and necessary regulation of interstate commerce by Congress, but is an unnecessary and arbitrary burden imposed upon the carrier for the mere convenience of the shipper and in this act Congress exceeded the power embraced in the constitutional grant.

97

The constitutional grant of power to regulate interstate commerce does not carry the authority to impose burdens on carriers engaged in interstate commerce not necessary to a reasonable and proper regulation of matters of general concern. This rule exists independent of constitutional limitations. It is said by Mr. Tiedeman, in

his Treatise on the Limitations of Police Powers, p. 10, that: "The unwritten law of this country is, in the main, against the exercise of police power, and the restrictions and burdens imposed upon persons and private property by police regulations are jealously watched and scrutinized." Citing and quoting from Berthold v. O'Reilly, 74 N. Y., 509, as follows: "'The main guaranty of private rights against unjust legislation is found in that memorable clause in the bill of rights, that no man shall be deprived of life, liberty or property without due process of law. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith, or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without its dismemberment, the right to liberty, the right to exercise his faculties, and to follow a lawful avocation for the support of life, the right of property, the right to acquire property and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.'" (Italics our own.)

98 And continuing, the author says: "In searching for constitutional restrictions upon police power, not only may resort be had to those plain, exact and explicit provisions of the Constitution, but those general clauses, which have acquired the name of 'glittering generalities,' may also be appealed to as containing the germ of constitutional limitation at least in those cases in which there is a clearly justifiable violation of private right. Thus, almost all of the State constitutions have, incorporated in their bills of rights the clause of the American Declaration of Independence that all men 'are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' If, for example, a law should be enacted which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizens unnecessarily, and in such a manner that it did not violate any specific provision of the Constitution, it may be held invalid, because in the one case, it interfered with the inalienable right of property, and in the other case it infringed upon the natural right to life and liberty. 'There is living power enough in those abstractions of the State constitutions, which have heretofore been regarded as mere "glittering generalities," to enable the courts to enforce them against the enactments of the legislature, and thus declare that all men are not only created free and equal, but remain so, and may enjoy life and pursue happiness in their own way, provided they do not interfere with the freedom of other men in the pursuit of the same objects.'" (Citing People v. Turner, 55 Ill., 280.)

Again, on page 12, the author says: "'Powers which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, com-

fort and well-being of society or so imperatively required by
99 the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it.' (Italics our own.) And in all such cases it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power which is generally prohibited by the Constitution. 'It is the province of the law making power to determine when the exigency exists for calling into exercise the police power of the State, but what are the subjects of its exercise is clearly a judicial question.'" Citing and quoting from People v. Jackson, 9 Mich., 285, and Lakeview v. Cemetery, 70 Ill., 192.

In the contentions here submitted we are not unmindful that by reason of the public nature of the use to which appellant has devoted its railroad property, it has to some extent, ceased to be juris privata. One who devotes his property to public use undoubtedly clothes his property with a public interest, and grants to the public an interest, not in the property, but in its use, and must submit that use to the control of legislatures for the common good. But this applies only to the extent of general public necessity, and not to the mere conveniences of the users. The right to regulate within the meaning of this general principle is not the right to destroy or impair. It extends only to the right of reasonable, appropriate and necessary regulations, to fix reasonable charges and to prevent imposition or oppression, to require impartial treatment, and to promote the unrestricted flow of interstate commerce.

Munn v. Ill., 94 U. S., 113.

Special attention is also invited to the dissenting opinion
100 of Mr. Justice Field in this case.

The police power of Congress is much more restricted than is the similar power of the several States, for the obvious reason that it is a government of delegated powers, and is therefore, confined to that which is conferred by the Constitution. Numerous examples exist where attempts by the States to exercise this power over individual rights have been held unauthorized for want of general necessity therefor, and because the acts were unreasonable.

An ordinance of the City of San Francisco, setting apart a portion of the city for the Chinese, and requiring all persons of that nationality to locate and reside and conduct their business there, irrespective of calling moral character or physical condition, was held to be void, because its effect was unjust and oppressive, and did not pretend to be for the promotion of the safety, health or good morals of the city.

In re Lee Sing, 43 Fed., 359.

And another ordinance, which authorized a certain board of supervisors to allow or forbid the use of frame buildings to conduct laundries in, at the mere pleasure of the board, which was, in practice, applied to Chinese only, was held void for the same reason.

Yeck Wo. v. Hopkins, 118 U. S., 356.

The legislature of New York enacted a law applying to cities of 500,000 inhabitants, forbidding the manufacture of cigars in any tenement house occupied by three or more families, except on the first floor of such houses, and in which there was a store for the sale of cigars and tobacco. This was also held void for similar reasons.

In re Jacobs, 98 N. Y., 98.

The City of Jacksonville, Ill., enacted an ordinance requiring the railroad company to keep a flagman stationed at a par-
101 ticular street crossing, where, as it appeared from the facts, the danger to the public was not sufficient to authorize this unusual expense and care to be incurred when simpler and less expensive provisions could be made which would give protection. This ordinance was held unreasonable and void.

Ry. v. City of Jacksonville, 67 Ill., 37.

In the case of Central of Georgia Ry. Co. v. Murphy, 196 U. S., 194, the court had under consideration a statute of the State of Georgia somewhat similar to the one here in question. The Georgia statute was held unconstitutional, because it was an attempt to regulate interstate commerce. The Supreme Court say that the effect of such legislation is not to promote interstate commerce, but it is calculated to burden and retard it. If that was true of the Georgia statute, it is likewise true of the statute in question, and neither a State legislature nor Congress has the power to so burden and retard interstate commerce.

In passing upon that case, the court used the following language, significant in this case, for the purpose of showing the view that court will probably take of the act of 1906: "The loss or damage might occur on the line of a connecting carrier, outside the State where the shipment was made (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company receiving the freight from the shipper has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment, or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper in-
102 formation upon which its liability for the *for the* loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the State, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect except upon a very onerous condition, and it is not of that class of State legislation which had been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract unless such carrier comply with

the provisions of the Statute by obtaining information which it has no means of compelling another carrier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier, over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." (Italics our own.)

The Supreme Court of the United States, in Reagan v. Farmers Loan & Trust Company, 154 U. S., 362, 14 Sup. Ct. Rep., 1047, covered the entire scope of the authorities and the reason in the following short paragraph. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that, under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any
103 private property legally acquired and legally held." (Italics our own.)

It cannot be logically contended that it is a just and proper exercise of the power to regulate interstate commerce thus to take for private use the money of an innocent carrier, unless this is necessary to the preservation of property rights of the general public. If common carriers were, as a class, corrupt, and engaging in a widespread practice of "freebooting", it would be a proper exercise of the police power of the several States to lay reasonable restraints upon the guilty, and, in a proper case, this power might be exercised by Congress, but it is doubtful, because each wrong would be an offense against the local jurisdiction of a particular State, where there resides ample power to protect and to punish.

But in no case could the punishment of the innocent be justified as a remedy for wrongs of this character suffered not by the multitude collectively, but by certain isolated individuals who patronize carriers, and who may, or may not, in the aggregate constitute a considerable proportion of the entire population. In order to illustrate the fallacy and want of logic in the theory of the law—if that be its theory—we need only to say that if you could lawfully compel one innocent person to respond in damages to another for the wrong of an entire stranger to him, you would have a peculiar alleviation (?) of wrongs, with the evil still existing. You would be taking from one innocent citizen, under forms of law, his money, to reimburse another from whom a stranger had taken a similar sum. After the administration of this rule, you have not punished the guilty, nor have you made him disgorge. You have simply made another victim. You have transferred the burden of the wrong to another innocent man's back. The latter, as a wrong is more reprehensible than that of the one who caused the loss, because it is perpe-
104 trated by the Government upon a helpless victim, who cannot resist. It would be likened to the case where a guardian ad-

ministers the lash to his innocent ward, because of the incorrigible conduct of another ward. It is no answer to our contention to say that the law has afforded the last victim a remedy against the wrong-doer. The government has no right to take the money of a citizen in exchange for a chose in action, however good it may appear to be.

But this remedy, which the government so charitably provides the victim for the money taken, is in fact no remedy. It is a law suit, which may be fruitful. Inother words, the victim is subrogated to the complainant's rights, whatever they were, but the judgment is not made, and could not have been made res judicata of the issue of liability against the supposed wrong-doer.

Pennoyer v. Neff, 95 U. S., and cases following it.

It may transpire that the wrong-doer lives in a remote part of the United States, or in Mexico, or the Dominion of Canada. It is not clear that the act does not attempt to apply to foreign shipments, but this is not material to the point here under consideration.

When the victim of the law goes to the domicile of the wrong-doer—if in fact there was a wrong-doer, and if he may ever discover which of the many connecting carriers did it—to prosecute against him the supposed cause of action, which his government has so generously bestowed upon him he has no assurance that the supposed wrong-doer himself has not an ample defense.

But for what good reason is the burden of this risk and expense of litigation imposed upon the initial carrier? Is it because he is possessed of wealth, experience, or means of information, and the sinews of war peculiarly adapted to the successful prosecution of this class of legal warfare, and which will, with absolute certainty,
105 insure victory in such suits against his new antagonist? If so, it is based upon very peculiar logic, for is it not true that the new antagonist, being himself a carrier, must likewise, by the same rule, be presumed to be equally as well equipped for such a contest? If the law's victim loses, as against his new antagonist, the result is, without doubt, spoliation. See Venning v. Ry., supra. With the same property the rule could be applied by Congress to all interstate passenger traffic also. The application of this rule to passenger traffic would produce very disastrous results.

If Congress had the power to do so, and would provide for the trial of all the issues as between the plaintiff and all carriers in one action, then there would be some semblance of justice in a rule which would, in such an action, apportion the loss between the carriers upon a rate or mileage basis, or some other equitable basis, where the wrong could not in whole or in part, be located.

If Congress has not the power to confer jurisdiction upon the Federal courts of one State over the persons of railroad companies domiciled in other States, for the purpose of trying cases like the one in question, then it would seem that such a remedy as was attempted could not, under any plan, be given the shipper without violating the Constitution. But it is unprofitable to discuss what Congress might have done. There was no attempt to give an adequate remedy against the real wrong-doer. The proviso that the

initial carrier may have his remedy against the wrong-doer is a legislative joke.

There is at least a semblance of justice in the Texas law of similar import—R. S., Arts. 331*a* and 331*b*—because, in the first place, it applies only upon through contracts adopted by the connecting carrier, and, in the second place, under other provisions of the statute, all the carriers may be joined in one action, and the damages may be apportioned and assessed against the real wrong-doers.

106 It cannot for a moment be contended that superior wealth, experience or means of information is a justification to impose such a burden upon an unoffending carrier. It could only be claimed to be necessary because the shipper would otherwise be required to go to a remote locality to litigate for his supposed rights. But this difficulty would not be obviated by the methods of this law, because it leaves the same cause of action in existence, with the same necessity to go to the same locality, at the same or greater expense, and at greater risk of loss, to litigate. The burden would only be transferred to other innocent shoulders, as before stated, with infinitely greater chances of loss, and without any hope of reimbursement, should the litigation be unsuccessful.

Ry. v. Murphy, supra.

The act of Congress in question, if it be given the construction placed upon it by the trial court and the Court of Civil Appeals, violates the Fifth and Fourteenth Amendments to the Federal Constitution, and Section 19, Article 1, of the Constitution of Texas, because its practical effect, in cases of this character, is to take the property of the initial carrier, without compensation and without due process of law, and it denies to such carriers the equal protection of the law.

In this case the record shows, without dispute, that the property was carried by plaintiff in error on a contract under which it agreed to carry the property to Galveston, Texas, only, and there deliver it to its connecting carrier, after which its liability should cease, entirely, and it appears in the bills of exception containing the excluded testimony that plaintiff in error was prepared to prove, and offered to prove, that it had fully complied with all that it contracted to do. Its right to plead and prove this defense was denied it in the trial court, and the verdict and judgment was necessarily for

107 defendant in error, because plaintiff in error could not meet the requirements and show delivery of the property at destination, or that it was lost or destroyed because of an act of God or the public enemy.

The amount involved in this case may not exceed $500, including all costs, but the result would be the same had the shipment in question been 1,000 bales of cotton, of the value of $50,000. The destruction of large quantities of cotton in transit, on compress platforms and in cars, or on shipboard, are very common occurrences. In such cases the burden might fall on the contracting carrier with sufficient force to destroy his business.

In view of such probable consequences, we submit to the court

that it is unreasonable to assume that Congress intended, by the act in question to arbitrarily take the initial carrier's property to compensate the shipper for loss or damage to his property, resulting from the wrong of a stranger, without some kind of an undertaking, express or implied, on the part of the initial carrier to be so bound. We therefore suggest that the proper interpretation of the act is found in Root v. Great Western Ry. Co., 45 N. Y., 524 (1871), where the Court of Appeals of New York construed a legislative act of that State of 1847 so similar in language and effect to the law in question as to raise the inference that this act, commonly known as the Carmack amendment, was taken from the New York statute.

The New York law reads as follows:

"Any railroad company receiving freight for transportation shall be entitled to the same rights, and be subject to the same liabilities, as common carriers.

"Whenever two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become liable to pay any sum, by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the company or companies by whose neglect or misconduct it became so liable."

108 In the case referred to, the defendant railway company was shown to have been a common carrier between Suspension Bridge, in the State of New York, and Detroit, Michigan, where it had arrangements with the Michigan Southern Ry., whereby the latter company received for further transportation all freight destined to points beyond and west of Detroit, which should be delivered to it by defendant. Root delivered to the New York Central Ry. Co., at Victor, New York, a package for shipment to a point in Michigan on the line of the Michigan Southern Ry., upon an express contract that the contracting carrier should transport the package to its warehouse at Suspension Bridge, and should not be liable for loss or injury to the property thereafter. The initial carrier safely transported the package to Suspension Bridge, and delivered it to defendant Great Western R. R. Co., who in turn safely transported it thence to Detroit, and delivered it to the Michigan Southern Ry. Co. On the same day the warehouse of the Michigan Southern Ry. Co., together with the package, was destroyed by fire. The Shipper, Root, sued the Great Western R. R. Co. for the damages relying upon the statute of 1847 above set out. Plaintiff's judgment recovered in the trial court was reversed by the Court of Appeals, that court construing the statute to be declaratory only, and to apply only to cases where there was an express or implied agreement to carry to the place of destination, when such destination was on another line. The power on the part of a carrier to make contracts to carry freight beyond its own line having been doubted, it was held that this act was intended only to settle the validity of such agreements, and to enforce them, and it was not intended to create a liabil-

ity to carry to a destination not on that carrier's line, where there was no contract so to be bound. In that case it was said by the court:

109 "The apparent injustice of holding a company subject to the liability declared by the statute, in cases where the provisions of the same statute giving a remedy over against the defaulting road could not operate, was obviated (in Burtis v. Ry., 24 N. Y., 269, where this act was first construed) by holding that the liability is not imposed by the statute, but must be voluntarily assumed by the carrier."

From a careful reading of the opinion in that case, it would seem that, but for the construction given it, the court would have held the act unconstitutional. If the Carmack amendment was borrowed from the New York statute—and with one exception, presently to be noticed, they are identical in legal effect—is it not true that the New York interpretation and construction of it settled in 1891 must accompany it?

The one point of difference between the New York statute and the Carmack amendment is, that the latter carries a clause forbidding the carrier to incorporate in his agreement any stipulation in contravention of the requirement of the act to deliver at destination, or become liable, as at common law. In other words, following the New York construction, it means that, having agreed (and it requires in all instances the issuance of bills of lading) to carry an interstate shipment of property to destination on another carrier's line, a limitation of liability as it existed at common law shall not be embraced in the contract.

If we are correct in the contention that the New York construction is the correct one, and must prevail then it would seem without doubt that the proviso referred to above as the only point of difference between the State and Federal statutes is also declaratory, and can have no higher dignity than the main provisions of the article, and it must, therefore, be construed as indicated above.

If this be the proper interpretation of the law, it was misconstrued by the trial court and the Court of Civil Appeals, and plaintiff in error was erroneously deprived, by the trial court, of

110 an ample defense to the cause of action, by striking out its special answer, and by excluding the testimony to sustain it.

If the act of Congress known as the Carmack amendment was properly interpreted and applied by the trial court and the Court of Civil Appeals in this case, then we insist, in addition to the claim already presented, that Congress, in this amendment, exceeded the authority granted, in that the amendment itself violates the State and Federal Constitutions in the particulars stated in all the specifications of errors.

The amendment in question reads as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefore, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common

carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company, issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

In the outset we desire to invite the attention of the court to the well settled principle of law that what a carrier may have at times voluntarily chosen to do cannot be forced upon him without his consent, and it furnishes no rule by which to determine the reasonableness of a regulation. See Ry. v. Smith, 173 U. S., on page 697. Attention is also invited to another well established principle of law, that a carrier cannot refuse to accept interstate shipments of property properly tendered for transportation, merely because its destination is beyond the end of his line.

111 York Mfg. Co. v. Ry., 3 Wall., at p. 112.
Ry. v. Central Stock Yards (Ky. 1906), 97 S. W., 778.

But as if there existed a doubt about this proposition the Carmack amendment itself requires this service.

It is also, in effect, held, in Ry. v. Smith, supra, that a legislative act which deprives the initial carrier of the right to make, in good faith, a contract not malum in se, made for the reasonable protection of its property and business is a taking of property without due process of law, and violative of the Fifth Amendment of the Federal Constitution. This principle is well sustained in other cases to be hereafter cited and discussed.

Contracts designed to promote immoral principles, or in restraint of trade, such as the transportation of lottery tickets (188 U. S., 321), and agreements to fix and maintain a standard of prices or rates (171 U. S., 570), fall in the class of contracts sinister and evil in their effect, and therefore not within the rule of protection insisted upon.

The private right of contract has been controlled in the past, as before stated, and justly so, where the lives, health and morals of the people were concerned. Governments must necessarily have the inherent power to protect the lives, health, morals and property of its people. It is this right of self-preservation out of which the theory of police power was evolved. In fact, the very rights protected by the provisions of the Constitution here invoked are based upon the same recognition of inherent right. Indeed, the preservation of the inherent rights of the individual is esteemed more important than the existence of the government, for the government itself was instituted to preserve them. From this it must follow that

to justify the invasion, however slight, of such rights, there must be a necessity to conserve, in a general way, for the protection of life, liberty, property or the morals and good order of the
112 people. Beyond this the police power cannot go. Lochner v. N. Y., supra. Other cases coming within this rule are: Holden v. Hardy, 169 U. S., 366, upholding a statute regulating the hours of labor in the unhealthful employments of coal mining and smelting ores; Jacobson v. Massachusetts, 197 U. S., 11, 25 Supt. Ct. Rep., 358, upholding a law requiring vaccination, and Petet v. Minnesota, 177 U. S., 164, 20 Sup. Ct. Rep., 666, upholding a statute declaring that shaving is not a work of necessity or charity, and requiring all barber shops to be closed on Sunday.

For a general discussion of this subject see Allgeyer v. Louisiana, 165 U. S., 578, 17 Sup. Ct. Rep., 427, and Lochner v. New York, Supra.

It cannot possibly affect the rule stated because of the public nature of appellant's business, because the constitutional inhibitions apply to all persons, natural and artificial, alike. (Ry. v. Smith, 173 U. S., 684.)

In the matter of the transportation of interstate commerce, the carrier violates no moral principles, nor does he infringe upon any one's rights when he insists upon the right to make contracts of carriage to the ends of his own rails only and to absolve himself from further liability by delivering the property to the next carrier on the designated route. It is but the thoughtful exercise of good business judgment and foresight to refuse to be held liable for the default and wrongs of strangers over whom he has no control. Such contracts are founded in good faith, and sound business and moral principle, and common honesty, and for all time the right to make such a contract has been esteemed to be among the most valuable guaranteed by the State and Federal Constitutions.

It is no answer to this proposition to say that public policy is to be determined by the legislative body. The Constitution is supreme, and the legislative body cannot, under guise of declaring
113 public policy, or the exercise of police power, arbitrarily deprive the citizens of such natural right.

The shipper of interstate commerce has no natural right to complain of the initial carrier for the wrong of one who is an entire stranger; on the contrary, the initial carrier like any other person, has a natural right to his money and property and his business, and to preserve and enjoy them as against the claims of one against whom he has committed no wrong, and has the natural right to make contracts not against public policy. It is, in fact rather against good morals and public policy to destroy such rights, and such oppression is calculated to impair the faith and confidence of the people in their government. The right to make such a contract is a property right protected by the Constitution. Southern P. Co. v. Interstate Com. Com., 200 U. S., 536, at p. 556, 26 Sup. Ct. R., 330.

The rule enacted in the statute in question, as we have shown is not for the legitimate protection of any right of the shipper against the initial carrier, but is intended to serve his private con-

venience only, and is, therefore, wholly unsustained by any principle of justice or sound morals.

Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Yeck Wo. v. Hopkins, 113 U. S. 356; 6 Sup. Ct. Rep., 1064.
Crowley v. Christensen, 137 U. S., 86; 11 Sup. Ct. Rep., 13.

An example of unauthorized legislative interference with the rights of the citizen in his private right of contract by Congress is found in the act of June 1st, 1898 (U. S. Comp. St. 1901, p. 3205). Sec. 10 of that act made it a penal offense for any agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employé from the service of such carrier because of his membership in a labor organization. This
114 act was held unconstitutional in Adair v. United States, U. S., 28 Sup. Ct. Rep., 277, reversing the judgment of the District Court, 152 Fed. Rep., 737.

We take the liberty to quote here a part of that opinion as follows: "This question is admittedly one of importance, and has been examined with care and deliberation; and the court has reached a conclusion which in its judgment is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason.

"The first inquiry is whether the part of the tenth section of the act of 1898, upon which the first court of the indictment was based, is repugnant to the fifth amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion, that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by the amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that 'in every well ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.' Jacobson v. Massachusetts, 197 U. S., 11, 29; 49 L. Ed., 643, 651; 25 Sup. Ct. Rep., 358, 362, and authorities there cited. (Italics our own.) Without stopping to consider what
115 would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious

to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employé of the railroad company upon the terms offered to him. Mr. Cooley, in his Treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.'

"In Lochner v. New York, 198 U. S., 45, 53, 56; 49 L. Ed., 937, 940, 941; 25 Sup. Ct. Rep., 539, 541, 543, which involved the validity of a State enactment prescribing certain maximum hours for labor in bakeries, and which made it a misdemeanor for an employer to require or permit an employé in such an establishment to work in excess of a given number of hours each day, the court said: 'The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S., 578; 41 L. Ed., 832; 17 Sup. Ct. Rep., 427. Under
116 that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed "police powers" the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S., 623; 31 L. Ed., 205; 8 Sup. Ct. Rep., 273; Re Kemmler, 136 U. S., 436; 34 L. Ed., 519; 10 Sup. Ct. Rep., 930; Crowley v. Christensen, 137 U. S., 86; 34 L. Ed., 620; 11 Sup. Ct. Rep., 13; Re Converse, 137 U. S., 624; 34 L. Ed., 796; 11 Sup. Ct. Rep., 19. * * * In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other

to sell labor.' Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people." (Italics our own.)

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In another place, in the same opinion, the court say:

"We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat., 1, 196; 6 L. Ed., 23, 70; Lottery case (Champion v. Ames), 188 U. S., 321; 353; 47 L. Ed., 492; 500; 23 Sup. Ct. Rep., 321.

"It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce, and, as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty, as well as the right of property of the defendant Adair."

In the well considered case of Venning v. Ry. (S. C.) 38 S. E. R., 983; 12 L. R. A. (N. S.), 1217; 49 Ann. & Eng. Ry. Cases (N. S.), 666, a statute of the State of South Carolina, similar to the statute of the State of Texas, passed upon in Ry. v. Lynch (97 Tex., 25), was under consideration. The South Carolina statute, like the Texas statute, was held bad, in so far as it attempted to apply to interstate commerce, but, like the Texas statute, it was held a proper exercise of authority, in so far as it applied to intrastate commerce, and this conclusion was reached because, notwithstanding the act imposed liability upon the carrier sued, for the default of another carrier, it was so held because this was true only when the former had, by adoption of the contract, become a party to the agreement for through transportation; and also because it left him free to avoid this liability by repudiating the original contract.

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In the Venning case the court in part say:

"The defendant submits that the act is obnoxious to the Fourteenth Amendment of the Constitution of the United States, and Section 5, Article 1, of the Constitution of South Carolina, in that it denies to common carriers the equal protection of the law, and should be declared void even as to the transportation of goods by connecting lines entirely within the State. The argument in support of this proposition is strong, but we do not think it is conclusive. While the law-making branch of the State government has no power to require persons or corporations to make contracts, it has in gen-

eral the power to regulate the business of public transportation within its borders. Considered with respect to such business, in this act the General Assembly has, in effect, forbidden a common carrier to recognize, acquiesce in, or act upon a through contract of shipment made by a shipper, owner or consignee with another carrier, except upon condition that it shall become liable for any default of such other carrier. But the carrier may avoid this liability for the default of another by refusing to recognize, acquiesce in, or act upon the through contract of shipment. A carrier it is true, is required by Section 2177 of the Civil Code of 1902 to forward freight sent on another road 'according to the directions contained thereon, or accompanying the same,' and we think, aside from this statute, the common law imposes the obligation upon the carrier to receive and forward goods tendered by another carrier, just as if they were tendered by the owner. But in doing so it need not recognize, acquiesce in or act upon the through bill of lading. It may receive the goods, give its own receipt, charge its own freight, and in all respects repudiate or disregard the through bill of lading. By thus refusing to recognize, acquiesce in or act upon the through bill of lading, it would avoid liability for the default of another. It cannot, therefore, be said that the statute denies to the carrier the right to prosecute its business, except upon condition that it shall become liable for the defaults of others."

In passing upon the Texas statute, which, as before stated, is similar to the South Carolina statute passed upon in the Venning case, Judge Gaines, speaking for this court, in T. & P. Ry. v. Lynch, 97 Tex., 25; 75 S. W., 486, says: "But in our opinion, it was not intended to authorize a suit against two railroad companies not acting under a joint contract for the distinctly separate wrong of one merely because property had been transported over the connecting lines of the two. It would in our opinion be difficult to justify such legislation upon any correct principle. If, for example, the cause of action was against the second carrier company for a total
119 destruction of the property on its line by a railroad wreck, why sue the first, who did not contract to carry beyond its own line, and was in no manner responsible for the loss of the property?" (Italics our own.)

The Court of Appeals of the State of New York, in the case In re Jacobs, supra, among other things, on this point say: "Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In the case of Mugler v. Kansas, 123 U. S., 623, the court, among other things, say: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

See also—

State v. Dircks (Mo.), 111 S. W., 1, and

120 Ry. v. State (Ark.), 111 S. W., 456.

In this connection we again invite the attention of the court to the quotations hereinbefore set out from Ry. v. Murphy and Reagan v. Farmers Loan & Trust Co.

The purpose and effect of the Carmack amendment is to supply the shipper a convenient victim, from whose property he may reimburse himself for the wrong done him by some stranger at a distance. The policy of the law seems not to concern itself with such trifling matters as the guilt or innocence of the victim; its chief concern seems to be the convenience of the victim to the shipper.

From any point of view this feature of the act is, in our humble judgment, indefensible upon any sound principle.

Is it not true that this amendment, by reason of the provisions of Section 1, is an arbitrary and unjust classification, as between carriers engaged in the same character of business?

It seems to be perfectly clear that, under the provisions of Section 1 of the act of February 4th, 1887 (Fed. Stat. Ann., Vol 3, p. 809), this statute, in all its provisions, applies only as against common carriers "engaged in the transportation of passengers or property wholly railroad, or partly by railroad and partly by water, when both are used, under a common control, management or arrangement, for a continuous carriage or shipment from," etc. Its terms do not include carriers by water.

U. S. v. Morsman (1890), 42 Fed., 448;
Ex parte Koehler, 30 Fed., 869.
Ry. v. Int. St. Com. Com., 162 U. S., 197.

An action for damages under the interstate commerce law is one to recover money in the nature of a penalty. The suit here under consideration is highly penal in its nature.

Ratican v. Railway (1902), 114 Fed. R., 671.
Parsons v. Railway (1897), 167 U. S., 447.

121 In this case it appears from the pleadings of appellant, and from the facts offered by it and excluded by the court, that two of the carriers in the chain of carriage of this shipment were independent steamship lines. Courts will judicially know that independent lines of carriage exist by water coastwise, and by inland

lakes and rivers, connecting hundreds of commercial marts on our seaboard in the United States and adjacent countries, and that these carriers are commonly engaged—in fact, the majority are exclusively engaged—in the interstate carriage of freight and passengers, and very extensively so engaged. These carriers are not embraced within the provisions of the act, and may, therefore, pursue their business—which is identical with that of appellant and all others who carry by rail and water under one control—and may compete for the business, without being subjected to the severe penalties and onerous burdens of this law. There is no just reason for exempting from the provisions of this act that class of carriers referred to. On the contrary, if the object of the law is to promote interstate commerce, and protect the shippers, and if this could lawfully be done in the manner attempted by Congress, the class of carriers exempted, of all others, should have been embraced therein, because they carry an immense amount of the interstate traffic of the country, and as a rule are less responsible than railroad companies, while the risk of carriage of property by that method is much greater.

In the case at bar the property was, as a matter of fact, routed by way of two independent steamship companies. It is not material that such a condition actually existed in this case. It is of special importance only by way of illustration. Had appellee's mohair been lost through the negligence of either one of the steam-
122 ship lines, appellant would probably have been without remedy against it, dependent upon the construction of the act. On the other hand, had an independent steamship or steamboat line originated the shipment, the law would not apply, notwithstanding the greater portion of the transportation was by rail.

It is possible for a very large proportion of the interstate traffic of the country to originate with carriers by water exclusively. All of this immense traffic cannot, in our judgment, be embraced within the provisions of the act of Congress, and the originating carriers are exempted from liability thereunder, as before shown.

From these conditions it appears that a very large number of common carriers, and an immense amount of interstate traffic, escape the drastic provisions of the law, and in the event that a carrier, exclusively by water happens to be one of the connecting carriers, and the property is lost or damaged through his fault, the initial carrier, if a railroad company, has no redress under the law, because, under its terms, it is made to apply only to the latter, and if such be the proper construction of the act, the initial carrier could not recover the money forced from him under the act, and the result would be confiscation.

This question of legislative discrimination has been so often discussed by the United States Supreme Court the controlling authority in this case—that we will content ourselves with the citation of a few only of the many cases on the subject decided by that court, and with the observation that, in our judgment, the situation here shown illustrates that the act in question falls on the wrong side of the line of demarcation drawn by the authorities. It is an unreasonable discrimination, and the result is not due process of law. The

authorities cited have to do chiefly with State legislative en-
123 actments, but they apply with equal force to Federal statutes because Congress has no more authority to arbitrarily discriminate against persons than the State legislatures.

Ward v. Maryland, 12 Wal., 418; 20 L. Ed., 449.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Ry. v. Ellis, 165 U. S., 158; 17 Sup. Ct. Rep., 255.
New York v. Roberts, 171 U. S., 683; 19 Sup. Ct. Rep., 77.
The dissenting opinion of Mr. Justice Harlan and cases cited, Yeck Wo v. Hopkins, 118 U. S., 356.

We are not unmindful that the Fourteenth Amendment to the Federal Constitution is primarily a limitation upon State legislation, but it must necessarily also be a limitation on congressional legislation, when considered in connection with the preamble to the Constitution, and in view of Section 2 of Article 4, and of the Fifth Amendment.

The remaining specifications of error, with the exception of the last one, grow out of the exclusion of stipulations in the contract limiting the carriage of the property and the liability to appellant's line, and question also the action of the court in excluding the testimony of several witnesses constituting a chain of testimony showing compliance with the terms of the contract. These specifications of error involve the validity and construction of the act of Congress in question, and must necessarily stand or fall on the reasoning and authorities already submitted. They will, therefore, be submitted without argument, with the request that they be given consideration.

The last specification of error questions the sufficiency of the facts to support the judgment in any event, and to this the attention of the court is invited.

The act of Congress of June 29th, 1906, is an invasion of the exclusive legislative prerogative and reserved rights and powers of the State of Texas under Articles 9 and 10 of the Federal Constitution, and is, therefore, void, and it was error for the trial
124 court to apply and enforce it, as was done by sustaining the exception and striking out appellant's special answer, in which was presented a just and lawful defense.

Bridge Co. v. Kentucky, 154 U. S., 204; 14 Sup. Ct. Rep., 1087.
Budd v. New York, 143 U. S., 517; 12 Sup. Ct. Rep., 468.
Munn v. Illinois, 94 U. S., 114.
Pick v. Ry. Co., 94 U. S., 164.
Ry. v. State of Iowa, 94 U. S., 155.
Minnesota v. Barber, 136 U. S., 313; 10 Sup. Ct. Rep., 862.
Yeck Wo v. Hopkins, 118 U. S., 356; 6 Sup. Ct. Rep., 1064.
Crowley v. Christensen, 137 U. S., 86; 11 Sup. Ct. Rep., 13.
Arts. 9 and 10, U. S. Constitution.

The acts of Congress of June 29th, 1906, in so far as it compels the carrier of a State to contract for the carriage of interstate commerce to its final destination, and become liable therefor, as at com-

mon law, for the wrongs, and defaults of strangers in another State, is an invasion of the sovereignty of the States. While it is true that the trunk lines of railroad in this and all other States are necessary agencies in the conveyance of interstate commerce, to such an extent that the fact must be judicially known, nevertheless their maintenance and their preservation are purely questions of State concern. They are local highways. Their charters and franchises are granted by the State, and quasi-public duties of very great importance to the State, and of peculiar local interest, are necessarily imposed upon them for the benefit of the citizens of the State.

125 It cannot be doubted that the legislature of a State may, within the exercise of its police power or sovereignty, prohibit railroad companies, created by its authority, from making contracts that would probably impair their ability to discharge their public duties to the people within their local jurisdiction, even though this might indirectly affect interstate transportation. It would seem to be clearly within the special province of the State to regulate the business of its own railroad companies and other citizens in the conduct of their business, except where the exercise of this power would impose a burden or restriction upon interstate commerce.

A regulation of the carrier's business by a State cannot be said to be in violation of what is known as the interstate commerce clause of the Constitution, unless such regulation directly impedes the flow of such commerce. A law that would prohibit the making of a contract, the result of which might impair the ability of the carrier to discharge its public *duties* to the State, could not be said to be a burden upon, or an impediment to, the flow of interstate commerce. See Munn v. Illinois, supra. In this case it was also asserted that Section 8, Art. 4, of the Federal Constitution operates only as limitation of the powers of Congress, and does not affect the States in the regulation of their domestic affairs.

An example of the right of the State to control the contracts of its railroad companies is our statutory regulation of the issuance of mortgages and bonds. If it be true that voluntary contracts by common carriers, wherein they undertake to assume liabilities, endangering their stability and usefulness, can be prohibited by the State, then it ought to follow as a necessary result that Congress cannot impose such burdens by force of statute without encroaching upon the special prerogative of the State, and, therefore, that part of the act of June 29th, 1906, which creates the liability as-

126 serted by appellee in this case, violates the Federal Constitution.

The contention of appellee that the innocent local carrier ought to be required to pay for the wrong of a carrier in another State, over whom it can exert no control, and with whom it has no connection, is a contradiction of the theory that the constitutional power to regulate commerce between the States was given to Congress for the purpose of promoting such commerce, and inducing carriers to engage in it, to the end that a general interchange of products should be fostered and induced to flow without interruption among the

States. It was said in Howard v. Ry. Co. (1908), 28 U. S. Sup. Ct. Reporter, 147, the court speaking of the contention that when a carrier engages in interstate commerce he submits all his business concerns to the regulation of Congress: "It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be other-wise beyond the power of Congress. It is apparent that, if the contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been and must continue to be under their control so long as the Constitution endures."

It is manifest that the practical workings of this act are calculated to retard that free exercise of the right which existed, in spite of the constitutional provision in question, to engage in interstate commerce. It not only retards the sale of but the carriage
127 of interstate commerce, by imposing penalties and restrictions upon the carrier who engages in it, which might possibly ruin and bankrupt him.

The exercise of this power over the right to contract might be attended with serious consequences to the State—the general public of the State—as well as the individual carrier. The case here under consideration will serve as an example. Here we have a carrier and a shipper, both residents of the State of Texas.

At common law the appellant could not be required to contract to carry beyond the borders of this State, nor beyond the end of its own line. By reason of various State statutory restrictions and regulations, it is required to keep and supply ample and reasonably safe road-bed, appliances and facilities to serve the public of this State, and it has no right by contract or otherwise to place itself in position whereby performances of these public duties and obligations may be put beyond its power, or whereby its ability to discharge them properly may be impaired.

The act of Congress, in effect, compels it to accept all interstate freight tendered to it, and to assume all the liabilities of a common carrier as at common law to the ultimate destination of the freight.

It goes further, and denies it the right to contract, respecting that shipment, restricting its liability to such loss and damage as occur upon its own line.

Here are two citizens of a single State, who meet to contract—and it is not material to this discussion that one is a carrier, and engaged in the discharge of a quasi-public duty. The one would prefer a contract that would relieve him of all further risk and expense, and compel the other to land his products at destination in

another State, it may be a shipment of the value of $500,000. The other is unwilling to make such a contract, because the loss of
128 the shipment would bankrupt him. It would destroy his power to further continue in the carrying business, and would place him in position where he could not comply with the public obligations assumed when his charter was granted.

In Texas we have a number of railroads which such a loss would bankrupt; and in Texas we have individuals and companies who might possibly desire to ship property in such quantities to the markets beyond the limits of the State.

The statute in question leaves the carrier no option. It does not even permit it to decline such a shipment. It must accept all freight tendered in proper form and at reasonable times and proper places, or forfeit the right to do business and suffer practically the loss of all its property. If Congress should see fit to apply such a rule to interstate passenger traffic, the result would speedily bankrupt all small roads in the country.

From what has been shown, it would seem to be clear that not only the free right of contract between citizens of this State is abridged by this act of 1906, but unfavorable, and it may be ruinous contracts are by force imposed by it upon the one without any reciprocal duty, obligation or consideration from the other for the extra risk and service.

The rights of the two parties, thus brought face to face for the purpose of contracting, is a matter purely of local concern, which involves the property rights as well as possibly the existence of the carrier as such, and it is a usurpation of the power of the State for the Federal government to step in and compel one of the citizens of a State to make a contract with the other which might, without fault or wrong on his part, bankrupt him and destroy his business and its usefulness as a public utility to the people of the State.

There is no necessity for Congress to establish a uniform
129 rule of this character, as contradistinguished from a convenience. It is not a matter which is incapable of regulation except by such a general rule. Indeed, it is a subject that has been otherwise regulated and controlled, that is, by common law principles, for many years.

Suppose the State legislature, prior to the passage of the act of June, 1906, deeming it unsafe to allow corporate carriers, created under and by virtue of its laws, and under important public obligations to it, had forbidden such carriers to make interstate contracts of the character now arbitrarily imposed upon them by Congress by that act. Could it be said that it had no power to do so, even though it may have been deemed necessary for the preservation of the roads, and their successful operation? If so, this conclusion could only be reached from a finding that the result directly burdened and obstructed interstate commerce, and did not merely operate upon it incidentally. Otherwise, the authority of the State could not be successfully challenged. But such finding is not logical. It is wanting in the sustaining element. The State legislative act would not result in burdening or obstructing commerce between the States if it tended

to preserve the properties of the carriers and promote the efficiency of the service by husbanding their resources. This would actually promote the desired general commercial intercourse. It would sustain the cherished purpose of the Federal Constitution, and would affect inter-state commerce only in a remote and incidental way. Nor would it obstruct such commerce to any appreciable extent, by way of discouraging the shipper, because of any difficulty he might experience in collecting his claims for loss or damage occasionally arising, for we have seen interstate commerce grow to enormous proportions under these alleged discouragements. Redress has been given all litigants with meritorious claims—and some without merit—with remarkable regularity and in lavish proportions. We do not
130 question that it would be a very great convenience to the inter-state shipper to supply him a victim at his door, as hereinbefore suggested, but it is not a necessity; and if it was a necessity, the wrong-doer would have to be brought to him for atonement, not an innocent man.

Such an act by a State legislature as the one suggested relates to the rights, duties and liabilities of the citizens of the State. It only indirectly and remotely affects the operation of commerce, and would, in our judgment, be clearly within the reserved power of the State, and within its exclusive prerogative. See:

Lake Shore & M. S. Ry. v. Ohio, 173 U. S., 285; 19 Sup. Ct. Rep., 465.

Hennington v. Georgia, 163 U. S., 299; 16 Sup. Ct. Rep. 1086.

Sherlock v. Alling, 93 U. S., 99.

Plumley v. Massachusetts, 155 U. S., 461; 15 Sup. Ct. Rep., 154.

Pittsburg & S. Coal Co. v. Louisiana, 156 U. S., 590; 15 Sup. Ct. Rep., 459.

L. & N. Ry. Co. v. Kentucky, 161 U. S., 677; 16 Sup. Ct. Rep., 714.

Geer v. Ry., 161 U. S., 519; 16 Sup. Ct. Rep., 600.

M. K. & T. Ry. Co. v. Hober, 169 U. S., 613; 18 Sup. Ct. Rep., 488.

New Mexico ex rel McLean v. Denver & Rio Grande R. R. Co., 203 U. S., 38; 27 Sup. Ct. Rep., 1.

If it be true that the legislature of a State has the power to prevent its incorporated carriers from making contracts that might result in impairing their public usefulness, then it would seem to follow, without doubt, that Congress cannot enact regulations in conflict therewith.

Imperative public necessity, national in its scope, might require the interest of the State to yield, but in this class of cases no
131 absolute necessity exists, as we have shown. On the contrary, the provision of the act is only intended to serve as a convenience, which is itself without necessity, logical reason or justice to support it, and not within the purview of the power to regulate interstate commerce.

Fifth Error.

The Court of Civil Appeals erred in overruling appellant's fifth assignment of error, and proposition thereunder, said assignment and proposition reading as follows:

Fifth Error.

(No. 3 in the Record, Tr., p. 39.)

The court erred in excluding from the jury that portion of the contract of shipment offered in evidence by defendant which reads as follows:

"It is expressly stipulated, as a condition precedent to the issuance of this through bill of lading and guarantee of through rate, that the liability of the said Galveston, Harrisburg & San Antonio Railroad Company is limited to its own line, and shall cease and determine upon delivery to a connecting and common carrier of the articles herein mentioned and in case of loss, damage or injury to any of said articles, that carrier alone shall be liable in whose (actual) custody said articles were, at the time of such loss, damage or injury."

All of which more fully appears in defendant's bill of exception No. 1, which is referred to and made a part hereof.

Proposition.

This contract was in all respects lawful and reasonable, and, when supported by proper proof, was an ample defense to the cause of action (assuming that the act of Congress of June 29th, 1906, did not and could not, for any reason, apply), and it was error for the court to exclude it.

Statement.

The contract contained the stipulations in question exactly as quoted. It was offered in evidence and was excluded upon the express reason that it was in contravention of the act of Congress of June 29th, 1906. (See bill of exception No. 1, Tr., p. 25; for other necessary facts see preliminary statement on the opening pages of this petition.) It was conceded in open court that this con-
132 tract was the one executed at the time of shipment. (See Tr., p. 14, top.)

Sixth Error.

The court of Civil Appeals erred in overruling appellant's sixth assignment of error and proposition thereunder, said assignment and proposition reading as follows:

Sixth Error.

(No. 6 in the Record, Tr., p. 40.)

The court erred in excluding the testimony by deposition of the witness Thompson, to the effect that, as a clerk for defendant, in

March, 1907, he transferred all mohair in question, on its arrival at San Antonio, to S. P. car No. 19138, taking it from the car in which it was shipped from Uvalde to San Antonio, and it was forwarded to Houston in the former car, all of which more fully appears in defendant's bill of exception No. 4, which is referred to and made a part hereof.

Proposition.

The testimony of this witness, so offered, was material and pertinent, and, along with the testimony of Thomas Belden, F. M. Hasselmeyer and George Alter, tended to make a complete chain of testimony, showing that the mohair in question was promptly and safely delivered by appellant at Galveston to the next connecting carrier, in full compliance with its contract, which delivery constituted a complete release from further liability under the contract.

Statement.

H. Thompson testified by deposition, in substance, that as an employé of appellee, he, at San Antonio, checked and transferred from Wabash car No. 71411 to car No. S. P. 19183, the identical mohair in question, on way-bill N. Y. No. 8, dated November 13th, 1907 which mohair left Uvalde in the first named car, and left San Antonio in the last named car for Galveston. This was excluded by the court, on appellees' objection, for the reason that the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of
133 action, for the reason that it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignee at Lowell, Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906, it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. (See bill of exception No. 4, Tr., pp. 30 and 31.)

Belden testified by deposition to the transfer at San Antonio, corroborating Thompson, but this was also excluded. (See bill of exception No. 5, Tr., pp. 31 and 32.)

Hasselmeyer testified, by deposition, to transferring and delivering the mohair from the same car to the connecting carrier at Galveston, Texas, which was also excluded (see bill of exception No. 6, Tr., pp. 33 and 34); and George Alter, agent in New York of the connecting carrier, Morgan line of steamships, testified by deposition, in substance, that he delivered the identical mohair in question at New York to the Metropolitan Steamship Company, a common carrier by ships, for further transportation to destination, which testimony was also excluded by the court, over plaintiff's objections. (See bill of exception No. 7, Tr., pp. 35 and 36.) All this testimony was excluded for substantially the same reasons stated above. (See the respective bills of exception referred to.)

The contract to carry to Galveston only, and releasing appellant from liability not occurring on its own line, was duly executed. (See statement under fifth error.)

There were neither pleadings nor facts in the record to dispute, vary or avoid the terms of the contract, nor was there any at-
134 tempt made to do so, except by force of the act of Congress of June 29th, 1906. (Vide the whole record.)

Authorities.

Ry. v. Jackson & Edwards, 89 S. W., 968.
McCarn v. Ry., 84 Tex., 352, and cases cited.
Moore on Carriers, pp. 459-462.

Seventh Error.

The Court of Civil Appeals erred in overruling appellant's seventh assignment of error and proposition thereunder, said assignment and proposition reading as follows:

Seventh Error.

(No. 7 in Record, Tr., pp. 40-41.)

The court erred in excluding the testimony of defendant's witness Belden, to the effect that, as an employé of defendant at San Antonio, he examined and broke the seals of the car containing plaintiff's mohair on its arrival at San Antonio from Uvalde in March, 1907; that the Uvalde seals were intact on its arrival at San Antonio; also, that the mohair was transferred into S. P. car No. 19,183, and this car was sealed immediately when loaded, all of which more fully appears in defendant's bill of exception No. 5, which is referred to and made a part hereof.

Proposition.

Belden's excluded testimony corroborated that of three other witnesses, by showing that the mohair in question was transferred to a certain car at San Antonio, on its way to Galveston, the same car from which another witness took it and delivered it to the next connecting carrier, in compliance with the contract. This testimony was, therefore, material to show compliance with the contract, which was in law an ample defense to the suit.

Statement.

The testimony excluded was by deposition, and was, in substance, that the mohair was transferred at San Antonio in to S. P. car No. 19,183, taking it from the car in which it was loaded at Uvalde, and that it was forwarded in the former car to Galveston. The testimony was held inadmissible, and excluded because of the act of Congress of 1906. (See bill of exception No. 4, Tr., pp. 30 and 31.)

135 For other facts, see statement under the next preceding assignment of error, and in the preliminary statement.

Eighth Error.

The Court of Civil Appeals erred in overruling appellant's eighth assignment of error and proposition thereunder, said assignment and proposition reading as follows:

Eighth Error.

(No. 8 in Record, Tr., p. 41.)

The court erred in excluding the testimony of defendant's witness Hasselmeyer, to the effect that as an employé of the Morgan line of steamships at the docks at Galveston, Texas, he checked a shipment of twenty-four bags of mohair out of S. P. car No. 19,183 into steamship El Norte, on its trip No. 140 to New York, March 24th, 1907, all of which more particularly appears in defendant's bill of exception No. 6, which is referred to and made a part hereof.

Proposition.

The proposed testimony of Hasselmeyer was by deposition, and showed that, as the checking clerk for the Morgan line of steamships at Galveston, Texas, according to his check slip, he checked twenty-four bags of mohair, on March 24th, 1907, out of S. P. car No. 19,183, into steamship El Norte, on her trip No. 140 to New York which testimony, in connection with that of Thompson and Belden, of San Antonio, and Alter, of New York, formed a complete chain of evidence, showing delivery of the mohair to the connecting carrier at Galveston, and complete compliance with the contract. The testimony was, therefore, material, and it was error to exclude it.

Statement.

The testimony substantially as stated above was offered and excluded, for the reason that the same is irrelevant, immaterial and incompetent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action, for the reason that, it being undisputed that defendant received the mohair in question from plaintiff, for transportation to the consignees at Lowell,
136 Massachusetts, and having executed its receipt and bill of lading therefor, under the act of Congress of 1906, it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route. See bill of exception No. 6. (Tr. pp. 33 and 34.)

Ninth Error.

The Court of Civil Appeals erred in overruling appellant's ninth assignment of error and proposition thereunder, said assignment and proposition reading as follows:

Ninth Error.

(No. 9 in the Record, Tr., p. 41.)

The court erred in excluding the testimony of defendant's witness Alter, to the effect that the Morgan line steamship El Norte conveyed to New York, on its trip No. 140, the identical mohair sued for by plaintiff, and as the agent for said Morgan line he transferred it all in good order to the Metropolitan Steamship Company, the next connecting carrier, for further transportation on the route to destination, taking receipts therefor, all of which more particularly appears in defendant's bill of exception No. 7, which is referred to and made a part hereof.

Proposition.

The testimony of the witness Alter was by deposition, and to the effect that as the agent of the Morgan line of steamships at New York he transferred from their ship El Norte, on her one hundred and fortieth trip from Galveston to New York, the identical mohair in question in this suit, and delivered same in good order to the Metropolitan Steamship Company, at the latter place, to be carried forward to destination, which testimony, under the law and contract, constituted a complete defense, and it was, therefore, error to exclude it.

Statement.

The witness testified by deposition substantially as stated above, and his testimony was rejected by the court on appellee's objection, for the reason "that the same is irrelevant, immaterial and in-
137 competent to establish or to aid in establishing any defense or extenuation against plaintiff's cause of action for the reason that, it being undisputed that defendant received the mohair in question for plaintiff, for transportation to the consignees at Lowell, Massachusetts, and having executed its receipt and bill of lading therefore, under the act of Congress of 1906, it became absolutely liable for all loss and damage resulting, and that it was no excuse or defense to show that the mohair was delivered to an intermediate or connecting carrier, or that failure to deliver at destination was the fault of some other carrier en route." (See bill of exception No. 7, Tr., pp. 35 and 36.)

For other facts, if any are necessary to support this proposition, see preliminary statement.

Tenth Error.

This court erred in overruling appellant's tenth assignment of error, submitted as a proposition, said assignment reading as follows:

Tenth Error.

(No. 10 in the Record, Tr., pp. 41-42.)

The court erred in overruling defendant's motion for a new trial, because the verdict and judgment are contrary to law, without any

facts to support them, or at least, against the overwhelming weight of the facts, in this:

Plaintiff wholly failed to show that the mohair in question was not actually delivered to the consignees at destination. On the contrary, the undisputed facts show that for many months after time for the mohair to arrive, the consignees had a number of bags of mohair—more than plaintiff lost—which had been by the carriers delivered to them, and which they had not identified and applied to any shipments because the marks had become obliterated or defaced, which unclaimed mohair was still in the hands of consignee at the time of trial, and part of it, no doubt, is the mohair in question.

And it further appears that the consignees have arbitrarily applied bags of mohair in many instances to shipments when, because of defaced marks, this was mere guesswork; and it is reasonably certain that plaintiff's mohair was thus disposed of by the consignees, if it is not in fact now in their possession, in the form of the numerous unidentified bags held by them.

This assignment of error, being itself in the nature of a proposition is submitted as such.

Statement.

The contract was to carry to Galveston, Texas,
138 only, and not to destination. (See the contract offered by appellee in evidence, Tr., p. 13.). The entire contract, as attached to appellant's answer (Tr. pp. 4 to 7.), was conceded to have been executed by appellant. (Tr. p. 14.) No attempt, by pleadings or facts, was made to avoid the contract, nor were there any facts to show loss or damage on appellant's line. (Vide the whole record.) Appellee testified that he did not know whether or not the consignees had received his mohair. (Tr. p. 13, at top.) His neighbor, Mr. Jones, shipped at the same time, and in the same shipment, the same amount of mohair that is, one-half of the clip from the same flock. Appellee's mohair was marked with the letters "J" and "D" connected, thus, "JD", and his neighbor's mohair was marked "J". About six weeks or two months after the shipment, his neighbor got returns from his mohair, showing that it was received at destination. (Tr. p. 12.)

David Hird, the "boss wool sorter" of the consignees at Lowell, Massachusetts, testified, by deposition, in substance, that at the time in question he was in the employ of the consignee and his duties were to check in all mohair received at the factory at Lowell, and make a record of it, and no one except himself received mohair for his employers, while he says that no mohair was received from appellee during 1907 by his employers. (Tr. p. 14.)

Cross-examination:

During the year his employer received large quantities of mohair from Texas, New Mexico, Arizona, Oregon, Turkey and Elsewhere—something like 500 bags per month from all sources during the shipping season; from Texas about 2,000 bags for the season. (Tr. p. 16.) From time to time he had numbers of bags of mohair which, because of loss or obliteration of marks of identification and tags,

he could not, with absolute certainty, apply to any particular shipment and he arbitrarily applied them on some invoice as best he could. At times it was difficult to identify them; in such
139 cases they were credited to an invoice "on supposition." From time to time they had a number of bags that could not be, and were not, applied on any invoices. Some were arbitrarily applied, and some never applied. Of the latter, ten bags remained unapplied, and were still in the warehouse when the witness testified. Some times a week or a month would elapse after arrival before the bags of doubtful identity would be applied. About one dozen bags of this kind were applied to invoices during that season. There are sometimes lengthy delays in arrival of parts of a shipment where it becomes divided in transit. Two months is the extreme limit of such delays. (Tr. bot. p. 16 and all of p. 17.) The consignee is engaged in the manufacture of mohair plush, and the making of mohair and worsted yarns for sale at Lowell, Massachusetts. (Tr. p. 15.)

Motion for new trial, embracing the issue that the verdict and judgment are wholly without any facts to support them, and against the overwhelming weight of the facts, with proper specifications of particulars, was in due time filed and overruled by the court, and exceptions saved. (See that part of the motion covering this question, and the order overruling it, Tr. p. 24.)

There was no proof that the defendant in error was the owner and holder of the bills of lading. (Vide the whole record.)

Remarks.

We deem it unnecessary to submit, under this assignment, more than a suggestion that the statute upon which defendant in error bases his right to recover is highly penal in its nature, and he is required to bring himself clearly within its terms by his pleadings and proof. One material element of his cause of action is, that he must be the owner and holder of the bills of lading. On this
140 subject he offered no proof. In view of the fact that the presumption is that title passes to the consignee in such cases, the presumption is against his title, but since the law under which he sues insists that he must be the owner and holder of the contracts before he can recover, which is a wise provision; it is not necessary to discuss presumptions where there is nothing in the record to base them on. The record is silent as to who owned the contract.

Conclusion.

In conclusion plaintiff in error respectfully submits that for the reasons herein set out it is entitled to the writ of error in this cause, and it accordingly prays for issuance and service thereof, and that, upon final hearing of this cause, it be reversed and dismissed, with the judgment for all costs against defendant in error; but, should the court find that plaintiff in error is not entitled to have the cause reversed and dismissed, then it prays that the cause be reversed and

rendered, or reversed and remanded, as the law and facts may warrant.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD,
W. B. TEAGARDEN,
G. B. FENLEY,
Attorneys for Plaintiff in Error,
Galveston, Harrisburg & San Antonio Ry. Company.

Endorsed: App. No. 6311. In the Supreme Court of Texas. Galveston, Harrisburg & San Antonio Railway Company, Plaintiff in Error vs. J. D. Crow, Defendant in Error. Petition for Writ of Error, to the Court of Civil Appeals Fourth Supreme Judicial District of Texas. By Baker, Botts, Parker & Garwood, W. B. Teagarden and G. B. Fenley, Attorneys. Filed in the Court of Civil Appeals, at San Antonio, Texas April 23, 1909. Jos. Murray, Clerk. Filed in Supreme Court Apr. 24, 1909. F. T. Connerly, Clerk. Refused.

141 Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the foregoing Seventy pages contain a true and correct copy of the original Petition for Writ of Error in App. No. 6311, Galveston, Harrisburg & San Antonio, Railway Company, Plaintiff in Error vs. J. D. Crow, Defendant in Error, now on file in this office.

I further certify that said application for writ of error was refused by the Supreme Court of Texas on the 28th day of April, 1909.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 7th day of July A. D. 1909.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

142 *Copy of Judgment in Supreme Court.*

In Supreme Court of Texas.

G., H. & S. A. Ry. Co.
vs.
J. D. Crow.

From Uvalde County, 4th District.

April 28th, 1909.

This day came on to be heard the application of G. H. & S. A. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused; that the applicant Galves-

ton, Harrisburg and San Antonio Railway Company and its surety The United States Fidelity and Guaranty Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Mo. for rehearing overruled May 26, 1909.

Witness my hand and the seal of said Court this the 28th day of May, 1909.

[SEAL.] F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

(Endorsed:) Application No. 6311. G., H. & S. A. Ry. Co. vs. J. D. Crow. Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Filed in the Court of Civil Appeals, at San Antonio, Texas, May 29, 1909. Jos. Murray, Clerk.

Petition for Writ of Error to the Supreme Court of the United States.

143 In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, Sitting at the City of San Antonio, Texas.

No. 4127.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
J. D. CROW, Appellee.

To Any Justice of the Supreme Court of the United States or the Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas:

Now come the Galveston, Harrisburg and San Antonio Railway Company, and the United States Fidelity and Guaranty Company, in the above cause, by their attorneys, and present this their petition for the writ of error from the Supreme Court of the United States to be directed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas in the above styled cause, and would respectfully represent, that on the 24th day of February, 1909, in the above styled cause—No. 4127, wherein the Galveston, Harrisburg and San Antonio Railway Company and none other was appellant, and the United States Fidelity and Guaranty Company was its surety on the supersedeas appeal bond, and J. D. Crow and none other was appellee, which cause was pending on appeal from the County Court of Uvalde County, Texas,—a judgment was rendered and entered against the petitioners, and in favor of said appellee, J. D. Crow, by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas; that on March 10th, 1909, ap-

pellant, in said cause, Galveston, Harrisburg and San Antonio Railway Company, filed in said Court of Civil Appeals its motion for rehearing, which motion was on March 24th, 1909, in all things overruled; whereupon, within the time allowed by law, appel-
144 lant filed its petition for writ of error to the Supreme Court of the State of Texas, which petition was by said Supreme Court denied on April 28th, 1909, and appellant's motion for rehearing in said Supreme Court, which was promptly filed, was by said Court overruled on the 26th day of May, 1909, whereby under the law of the State of Texas the said judgment on May 26th, 1909, became and now is a final judgment against petitioners, and in favor of said J. D. Crow; that the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, because of the refusal by said Supreme Court of Texas to grant the writ of error and review said cause, is, under the laws of Texas, the highest court in the state in which a decision in said cause could be had, and said Court is the lawful custodian of, and has now the possession of, all the records and papers in this cause.

Petitioners further show that in the said judgment of said Court of Civil Appeals, as well as the judgment and proceedings theretofore had in the trial court, there was manifest error to petitioners' prejudice, and of which they are aggrieved, as will hereinafter more fully appear; and petitioners respectfully represent that from the time of joining issue in this cause in the trial court there was drawn in question by appellant the validity of a statute of the United States upon which appellee's cause of action was based, viz: That portion of Section 20 of the act of 1887 as amended by the act of Congress of June 29th, 1906, which reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed," appellant's contention being, in substance, that said part of said law, and the authority exercised thereunder, violates the Constitution of the United States and of the State of Texas, and the de-
145 cision of said trial court and said Court of Civil Appeals were in favor of the validity of said statute and against the contentions and claims of appellant, and there was drawn in question by appellant the jurisdiction of the trial court and the state courts to try causes of action created by and arising out of said act of Congress, appellant objecting to the jurisdiction of the trial court for the reason that by the terms of Section 9 of the act of Congress to Regulate Commerce, approved February 4th, 1887, the Interstate Commerce Commission and the Federal Courts are given exclusive jurisdiction to try cases of this character, all of which claims, so pre-

sented by appellant, were decided by the trial court and said Court of Civil Appeals against it.

And your petitioners represent that titles, rights, privileges and immunities under the Constitution and Statutes of the United States, were, as aforesaid, claimed by petitioners in said suit, and the decision in said suit, both in the trial court and said Court of Civil Appeals, was against such titles, rights, privileges and immunities so claimed and asserted by petitioners, and this will more fully appear in the general demurrer contained in the first paragraph of the answer, which was overruled by the trial court, and in the special answer filed and urged by appellant in said trial court, (which was upon appellee's exception, excluded by the trial court), in the trial court's charge, and will also appear in the first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth specifications of error assigned in the said Court of Civil Appeals, and the several propositions stated thereunder, all of which your petitioners respectfully refer to as a part hereof. Appellant's claims to said titles, rights, privileges and immunities arose and were disposed of substantially as follows: Appellee's cause of action was filed in the County Court of Uvalde County, Texas, for the sum of $236.10, the alleged value of certain mohair delivered to appellant, Galveston, Harrisburg and San Antonio Railway Company, at Uvalde, Texas, for transportation, consigned to Lowell, Massachusetts, which mohair was alleged to have been lost in transit. Appellant in addition
146 to general demurrer and general denial asserted, by special answer, in substance, that it accepted the property under a written contract, whereby it was, in effect, agreed that it would carry the property to the end of its own line at Galveston, Texas, only, and there deliver same to its next connecting carrier, after which its duty and liability should entirely cease, which contract it asserted was fully complied with. Appellant also asserted in its special answer that the act of Congress of June 29th, 1906, upon which the cause of action is based, is violative of the 5th and 14th Amendments to the Constitution of the United States and the Constitution of the State of Texas, in that its effect is to take the property of appellant without compensation, and without due process of law, and to discriminate against it and deny it the equal protection of the law. Appellant asserted, also, that said act is an invasion of the legislative prerogative of the several states, and is therefore in violation of Articles 9 and 10 of the Federal Constitution. Appellant also asserted that the Interstate Commerce Commission and the Federal Courts alone have jurisdiction of the subject matter of the controversy, and the trial court was therefore without jurisdiction of the case.

Appellant's general demurrer to appellee's petition was overruled by the trial court.

Appellee excepted to appellant's said special answer for the specific reason that the contract set up therein contravened said act of Congress of June 29th, 1906, and was therefore void, and that compliance therewith was, because of the provisions of said act, no defense; which exception was sustained by the trial court and the entire special

answer was excluded. The court excluded testimony offered by appellant showing, without doubt, the existence of the contract as charged in the special answer, and full compliance therewith, and charged the jury, in effect, that if the property was delivered to appellant as charged in appellee's petition, appellant was, irrespective of any contract to the contrary, bound for its delivery at destination in Lowell, Massachusetts, unless it was lost because of an Act of God or the public enemy. Judgment was for
147 appellee in the trial court for the full value of the property and costs.

Exceptions to all the said rulings of the trial court were properly saved, motion for new trial was duly presented and overruled in the trial court, and upon appeal, which was promptly prosecuted to the said Court of Civil Appeals, where each and all said issues were properly insisted upon, the judgment was in all things affirmed as before shown, and each and all the said rights, privileges and immunities so claimed by appellant, as aforesaid, under the Constitution and laws of the United States, were thereby denied; whereas, had appellant's said contentions been sustained, the judgment must necessarily have been in its favor.

All of which errors so committed against your petitioners are fully apparent in the record and proceedings of the case now on file in said Court of Civil Appeals, and are specifically complained of in the assignment of errors filed herewith, which your petitioners respectfully request the court to read and take as a part hereof.

Wherefore your petitioners pray that the Writ of Error be allowed and issued herein to said Court of Civil Appeals for the removal of said cause to the Supreme Court of the United States, that an order be made fixing the amount of supersedeas bond required, and that upon giving such security all further proceedings in said Court of Civil Appeals be suspended; that a transcript of the record, proceedings and papers upon which said judgment and orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of the court in such cases made and provided, to the end that all errors in said cause committed may be reviewed and corrected and speedy justice done to the parties as the law and the facts shall warrant.

BAKER, BOTTS, PARKER & GARWOOD,
G. B. FENLEY,
W. B. TEAGARDEN,
Attorneys for Appellant, The Galveston, Harrisburg and San Antonio Railway Co., and the United States Fidelity & Guaranty Company.

148 Having received and considered the foregoing petition for writ of error, the same is in all things allowed upon bond being given by the petitioner in the sum of Twelve Hundred Dollars, conditioned, as required by law, and such bond, when filed and

approved, shall operate as a supersedeas and as a bond for costs and damages, as provided by law. This the 25 day of June, 1909.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

In the foregoing we each of us concur.

——— ———,
——— ———,
Associate Justices Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

(Endorsed:) No. 4127. Galveston, Harrisburg and San Antonio Railway Co., et al., vs. J. D. Crow, Petition for Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 25th, 1909. Jos. Murray, Clerk.

Appeal Bond.

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at the City of San Antonio, Texas, in Term Time, — Day of ——, 1909.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
J. D. CROW, Appellee.

Know all men by these presents; that, whereas, in the 149 County Court of Uvalde County, Texas, in a certain suit therein pending, wherein J. D. Crow, appellee, was plaintiff, and the Galveston, Harrisburg and San Antonio Railway Company, appellant, was the defendant, a judgment was rendered against said appellant for the sum of $240.90, besides all costs of suit, from which judgment said appellant perfected its appeal in due time to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, with the United States Fidelity and Guaranty Company, as the surety, on its appeal bond, in which court, upon said appeal, said judgment was affirmed and judgment was in said cause entered and recorded against appellant and its surety on said appeal bond and in favor of said appellee on the 24th day of February, 1909, for the said sum of all costs; and

Whereas, said appellant's motion for rehearing having been overruled, application was made by it to the Supreme Court of the State of Texas for a writ of error to said Supreme Court, which petition was, on the 26th day of May, 1909, overruled and denied by said Supreme Court of the State of Texas; and

Whereas, the said Galveston, Harrisburg and San Antonio Railway Company, appellant, and the said United States Fidelity and Guaranty Company have filed their petition for writ of error from the decision and judgment of said Court of Civil Appeals so ren-

dered, as aforesaid, to the Supreme Court of the United States, and having filed their assignment of errors herein in due time, they desire to suspend all further proceedings in said Court of Civil Appeals until the final determination of said writ of error by the Supreme Court of the United States; and,

Whereas, the said petition has been allowed, and the amount of bond which they are required to enter into for said purpose has been fixed at the sum of Twelve hundred ($1200.00) Dollars;

Now, therefore, we the said Galveston, Harrisburg and San Antonio Railway Company, and the said United States Fidelity and Guaranty Company, as principals, and Southern Surety Com-
150 pany and —— —— as sureties, hereby acknowledge ourselves to be jointly and severally firmly bound unto the said J. D. Crow in the full and just sum of Twelve Hundred ($1200.00) Dollars, to be paid to the said J. D. Crow, his certain attorneys, executors, administrators, or assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. The condition of the above obligation is such, however, that if the said Galveston, Harrisburg and San Antonio Railway Company and the said United States Fidelity and Guaranty Company shall prosecute their writ of error to effect, and shall answer all the damages and costs that may be awarded against them, if they shall fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof witness our signatures this the 25th day of June, 1909.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY AND THE UNITED STATES FIDELITY & GUARANTY CO., *Principals.*

By their Attorney, W. B. TEAGARDEN.

Attest:
E. G. DAVIS, *Sec'y.*

[SEAL.] SOUTHERN SURETY CO.,
By C. S. COBB, *President.*

The within and foregoing bond is hereby approved, as to form, amount and sufficiency of sureties, this the 3rd day of July, 1909.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

(Endorsed:) Galveston, Harrisburg & San Antonio Ry. Co. vs. J. D. Crow. Appeal Bond. Filed in the Court of Civil Appeals, at San Antonio, Texas, July 3rd, 1909. Jos. Murray, Clerk.

151 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, Holding Sessions at San Antonio, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sitting at the City of San Antonio, before you, or some of you, being the highest court of said State in which a decision could be had in the said suit between J. D. Crow, appellee, and The Galveston, Harrisburg and San Antonio Railway Company, appellant, and The United States Fidelity and Guaranty Company, its surety, being numbered 4127 on the docket of said Court of Civil Appeals, wherein was drawn the question of the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of their being repugnant to the Constitution, treaties, or laws of The United States, and the decision was in favor of their validity, or wherein a title, right, privilege or immunity was claimed under the Constitution or a treaty, or statute of, or commission held or authority exercised under The United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of The Galveston, Harrisburg and San Antonio Railway Company and The United
152 States Fidelity and Guaranty Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal distinctly and openly you send the records and proceedings with all things concerning the same to the Supreme Court of The United States together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of The United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 3rd day of July, in the year of our Lord, One Thousand, Nine Hundred and Nine.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk of the Circuit Court of the United States, Western District of Texas,
By A. J. CAMPBELL, *Deputy.*

Approved:
JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

152½ [Endorsed:] Galveston, Harrisburg & San Antonio Ry. Co. et al., vs. J. D. Crow. Writ of Error Filed in the Court of Civil Appeals, at San Antonio, Texas, Ju- 3, 1909. Jos. Murray, Clerk.

153 THE UNITED STATES OF AMERICA, *ss:*

To J. D. Crow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of The United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, wherein The Galveston, Harrisburg and San Antonio Railway Company and The United States Fidelity and Guaranty Company are plaintiffs in error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of The United States, this 3d day of July, in the year of our Lord, One Thousand, Nine Hundred and Nine.

JOHN H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Attest with the seal of United States Circuit Court for the Western District of Texas, this the 3rd day of July, 1909.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas.
By A. J. CAMPBELL,
Deputy.

154 Due service of the above and foregoing citation is hereby acknowledged, this 5th day of July, 1909.

J. D. CROW.
T. M. MILAM,
Att'y of Record for J. D. Crow.

154½ [Endorsed:] Galveston, Harrisburg and San Antonio Ry. Co. et al., Plaintiffs in Error, vs. J. D. Crow, Defendant in Error. Citation in Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Jul- 9, 1909. Jos. Murray, Clerk.

155 *Assignment of Errors.*

(Filed June 25, 1909.)

In the Court of Civil Appeals, Fourth District of Texas, Sitting in the City of San Antonio, Texas.

No. 4127.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY, Appellant,
vs.
J. D. CROW, Appellee.

Come now the Galveston, Harrisburg and San Antonio Railway Company, appellant, and the United States Fidelity and Guaranty Company and file this their Assignment of Errors, upon which they will rely in the prosecution of the Writ of Error before the United States Supreme Court in this cause, and for such specification of errors they say:

First. Appellant's general demurrer to plaintiff's petition was well taken, and the trial court erred in overruling it, because the cause of action being, without doubt, based upon Section 20 of the Act of Congress approved February 4th, 1887, as amended by the act of June 29th, 1906, the court was without jurisdiction of the subject matter of the controversy, jurisdiction over such causes of action being, by Section 9 of said law, lodged with the Interstate Commerce Commission and the Federal Courts exclusively, and the Court of Civil Appeals committed error in refusing to reverse and dismiss this cause on this ground.

Second. The trial court erred in overruling appellant's general demurrer to the petition, and the Court of Civil Appeals erred in sustaining that action, because the petition states no cause of action except under the act of June 29th, 1906, which act is itself in violation of the 5th and 14th Amendments of the Constitution of the United States, in this:

(*a*) In practical effect it takes the property of appellant
156 for a private purpose, without compensation and without just cause and without due process of law.

(*b*) It is an arbitrary, capricious discrimination against appellant, and those similarly situated, and denies them the equal protection of the law.

(*c*) It is not an exercise of the authority conferred by the Federal Constitution upon Congress to regulate commerce among the states, but exceeds the authority of Congress and invades the reserved rights of the several states in violation of Articles 9 and 10 of the Federal Constitution.

Third. The trial court erred in striking out appellant's special answer upon appellee's exception thereto, and the Court of Civil Appeals erred in sustaining this action, because in so doing appellant was denied an ample and valid defense based upon a lawful contract

made, and fully complied with, in good faith, which contract and defense was held to be bad because in contravention of the said act of Congress of June 29th, 1906, which act and the said action of said courts in enforcing it violates the 5th Amendment to the Constitution of the United States in that the effect of it all is to take appellant's property for private purpose, without wrong or fault upon its part, without compensation, and without due process of law.

Fourth. The said conduct of said trial court in excluding said answer was error, and said Court of Civil Appeals erred in sustaining said action thereby denying appellant the right to urge as a defense to the action its said contract and compliance therewith, and erred in enforcing said act of Congress of June 29th, 1906, against appellant in this case, because said law, and the action of the courts in enforcing it, violate the 14th Amendment to the Constitution of the United States in that appellant and those similarly situated are denied the free right to contract, to own, manage, and enjoy their property and conduct their business as other persons and corporations and common carriers may do, and particularly as to common carriers engaged in transportation of interstate commerce ex-
157 clusively by water; and it discriminates against those who patronize such carriers. Said act is, therefore, an arbitrary and capricious classification and denies appellant and others the equal protection of the law.

Fifth. The trial court erred in striking out appellant's said defenses set up in its special answer, and in enforcing said act of June 29th, 1906, against appellant, and the Court of Civil Appeals erred in approving of this action, because said act is not within the purview of the authority conferred upon Congress by the Federal Constitution to regulate commerce among the states, but it exceeds that authority and invades the reserved legislative rights of the states and the people, and therefore violates Articles 9 and 10 of the Federal Constitution.

Sixth. The trial court erred in giving in charge to the jury the second paragraph of the general charge, and the Court of Civil Appeals erred in approving same by affirming the judgment, which charge reads as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case that the plaintiff, J. D. Crow, on or about March 12th, 1907, delivered to the defendant at Uvalde, Texas, mohair for shipment, and that the defendant received said mohair, and billed the same to the Massachusetts Mohair Plush Company, at Lowell, Massachusetts; and if you further believe, from a preponderance of the evidence, that said mohair so delivered by plaintiff to defendant, if any, or any part of same, was not delivered to the consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff."

This was error because it applied and enforced the act of Congress of June 29th, 1906, and thereby compelled appellant to reimburse appellee for the wrong and default of an entire stranger over whom appellant had no control, thus taking its property for a private purpose without just cause and without compensation and without

due process of law in violation of the 5th Amendment to the
158 Constitution of the United States.

Seventh. The trial court erred in giving to the jury the charge set out in the next preceding specification of error, and in enforcing the said act of Congress of June 29th, 1906, against appellant, and the Court of Civil Appeals by affirming the judgment erred in approving said action, because said law and its enforcement is in effect an arbitrary and capricious classification as against appellant and others similarily situated in that it is thereby denied appellant the right to contract and to operate and manage its business and have and enjoy property, as other persons and common carriers may do, and particularly as common carriers exclusively by water may do, and it discriminates against the patrons of common carriers exclusively by water, and denies appellant and others similarly situated and those who patronize carriers exclusively by water the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

Eighth. The trial court erred in submitting to the jury the said charge set out in the sixth specification of error, and in enforcing against appellant the law enacted by — Congress of the United States, approved June 29th, 1906, and the Court of Civil Appeals erred in approving such action by affirming the judgment of said Court, because the said Act of Congress is not within the purview of the authority granted by the Federal Constitution to Congress to regulate commerce among the states, but exceeds that authority and invades the reserved rights and powers of the states, and therefore violates Articles 9 and 10 of the Federal Constitution.

Ninth. The trial court erred in giving to the jury the first paragraph of the general charge, and in enforcing thereby against appellant the said act of Congress of June 29th, 1906, and the Court of Civil Appeals erred in approving of this conduct by affirming the case. Said charge reads as follows:

"You are instructed by the court, that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and, as such common carrier, is liable to any person
159 from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration, and bills the same from a point in one State to a point in the same or any other State of this Union, for any damage to or loss of such freight, while being so transported, not caused by the act of God or at hands of public enemy."

This was error because the effect and result is violative of the 5th and 14th Amendments of the Constitution of the United States, and of Articles 9 and 10 of the Federal Constitution for reasons particularly stated in the sixth, seventh and eighth specifications of error, where the identical questions are presented, and the same are now referred to and made a part hereof to avoid repetition.

Tenth. The Court of Civil Appeals committed error in construing the act of Congress of June 29th, 1906, to mean that the initial carrier at all events should be liable as at common law for the delivery of interstate shipments at destination, irrespective of any contract

limiting liability to its own line and its own fault, but if valid at all it should have been construed to apply only to through shipments where there is an express or implied contract on the part of the initial carrier to carry to destination.

Wherefore plaintiffs in error pray that said cause be reviewed and that the judgment of affirmance of this cause made and entered in said Court of Civil Appeals be set aside, and that judgment be entered reversing and dismissing this cause, and that all costs of all courts be adjudged against defendant in error.

If, however, they be not entitled to such disposition of the case, then they pray that the cause be reversed and remanded, and that such other and further orders and decrees be entered herein for the settlement and protection of appellant's rights as the law and the facts shall warrant, and in duty bound they will ever pray, &c.

BAKER, BOTTS, PARKER & GARWOOD,
W. B. TEAGARDEN, AND
G. B. FENLEY,

160 *Attorneys for Galveston, Harrisburg & San Antonio Ry. Co., Appellant, and The United States Fidelity & Guaranty Company.*

(Endorsed:) No. 4127. Galveston, Harrisburg & San Antonio Ry. Co., et al., vs. J. D. Crow, Assignment of Errors. Filed in the Court of Civil Appeals, at San Antonio, Texas, June 25th, 1909. Jos. Murray, Clerk.

Cost Bill in Court of Civil Appeals, San Antonio, Texas.

G., H. & S. A. Ry. Co., Appellant,
vs.
J. D. Crow, Appellee.

From Uvalde County.

Record Filed Jan'y 12, 1909.
How Decided: Affirmed.
Names of Principals: Galveston, Harrisburg & San Antonio Ry. Co.
Names of Sureties: United States Fidelity & Guaranty Co.
Disposed of M'c'h 24, 1909.
Opinion by Fly, A. J.

Filing Record	$ .50
Docketing Cause	.50
Appearances	1.00
Filing Briefs and other Papers	3.10
Notices	6.00
Orders	2.00
Judgment	1.00
Recording of Opinion	1.25

Certificate with Seal	.50
Taxing Cost	.50
Certified Copy of Bill of Costs	1.00
Mandate	1.50
Filing and Docketing Motion	.35
Precept	1.00
Making Certified Copy of Motion	6.00

161 Bill of Costs. (Continued.)

Sheriff's Fees	$ 1.00
Transcript to Supreme Court United States	80.00
Transcript to Supreme Court	1.50
Express Charges to and from Supreme Court	.60
Costs in Supreme Court & Copy of application	36.05
	$145.35

THE STATE OF TEXAS:

I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs, for the sum of One Hundred forty five & 35/100 Dollars, is true and correct.

Given under my hand and seal of office this 10th day of July, 1909.

[SEAL.] JOE MURRAY, *Clerk.*

162 Clerk's Office, Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

I, Joseph Murray, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, hereby certify that the foregoing One hundred & sixty one pages, except pages 151 & 153, contain a true and correct copy of the transcript of the record of all the proceedings had in the County Court of Uvalde County, Texas, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas and in the Supreme Court of Texas, as the same appear of record and on file in this office in cause No. 4127 entitled, The Galveston, Harrisburg and San Antonio Railway Company, Plaintiff in Error, vs. J. D. Crow, Defendant in Error.

I further certify that the pages herein numbered 151 is the original writ of error, of which a copy has been lodged and is now on file in this office; and that the pages herein numbered 153 is the original citation in error, a copy of which is now on file in this office.

In testimony whereof, I have hereto signed my name and affixed the seal of the Court of Civil Appeals for the Fourth Supreme

Judicial District of Texas, done at the city of San Antonio, this the 12 day of July, A. D. 1909.

[Seal Court of Civil Appeals of the State of Texas.]

JOE MURRAY,
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

Endorsed on cover: File No. 21,776. Texas, 4th Supreme Judicial District Court of Civil Appeals. Term No. 550. The Galveston, Harrisburg & San Antonio Railway Company and The United States Fidelity & Guaranty Company, Plaintiffs in Error, vs. J. D. Crow. Filed July 28th, 1909. File No. 21,776.

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In the Supreme Court of the United States,

OCTOBER TERM, 1911.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILROAD COMPANY, AND THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiffs in Error, AGAINST J. D. CROW.	No. 550.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the Court of Civil Appeals for the Fourth Judicial District of the State of Texas.

Statement of Facts.

The action was brought in the County Court, Uvalde County, Texas. The plaintiff Crow by his original petition in that court charged that he was the owner of certain mohair respecting which, in March, 1907, he made a contract with The Galveston, Harrisburg & San Antonio Railroad Company, the defendant, by the terms of which the defendant (hereinafter called the Railroad

Company) agreed and undertook to transport said mohair from Uvalde, Texas, over its own line to Galveston, Texas, and to forward the same thence over its connecting lines to Lowell, Massachusetts, for delivery; that in violation of the terms of this contract the Railroad Company wholly failed to deliver the said mohair at Lowell to the plaintiff's damage in the sum of Two hundred thirty-six and 10/100 ($236.10) Dollars, for which recovery was asked. The defendant the Railroad Company filed a demurrer to the plaintiff's petition and also an exception for insufficiency for want of particulars and also an answer setting up a general denial and a special answer alleging that at the time of the shipment of the mohair in question a contract in writing for the transportation of the same was entered into between the parties and setting out the same at length.

The written contract pleaded in the special answer was in part as follows:

"UVALDE, TEXAS, M'ch. 12, 1907.

The Galveston, Harrisburg & San Antonio Ry. Co. hereby acknowledge receipt from Mr. Crowe (Consignor) the packages named below (contents and value unknown) in apparent good order marked and numbered as per margin for transportation from the station first above written to Lowell, Mass. And the Galveston, Harrisburg & San Antonio Ry. Co. agrees to transport same from the station first above written to Galveston and there deliver in like good order to Mass. Mohair Plush Co. (Consignee) or his assigns, provided destination is on this company's line, but if final destination is beyond

this company's line, then this company agrees to deliver said shipment in like good order to its next connecting carrier for consignee's account; in either event consignee agreeing to pay freight and charges as per margin.

Said articles are accepted for transportation upon the following terms and conditions which are expressly agreed to by the shipper:

1. It is expressly stipulated as a condition precedent to the issuance of this through bill of lading and guarantee of through rate that the liability of the said Galveston, Harrisburg & San Antonio Railway Company is limited to its own line and shall cease and determine upon delivery to a connecting common carrier of the articles herein mentioned. And in case of loss, damage or injury to any of said articles that carrier alone shall be liable in whose (actual) custody said articles were at the time of such loss, damage or injury; but delivery by any carrier hereunder to its next connecting carrier shall be complete when the property is placed at customary point of transfer and notice thereof given to such connecting carrier."

The bill of lading also contains twelve other paragraphs (pp. 4 and 5), to some of which attention will be called later. At the foot of the bill of lading are the words—

> "List of Articles: 3-1/2 bags of mohair. Marks, Consignee and destination: Mass. Mohair Plush Co., Lowell, Mass."

The special answer further alleged that the Railroad Company delivered the mohair in good order to its

connecting carrier at Galveston, Texas, the line of steamships known as the Morgan Line, a common carrier by steamship lines from Galveston to New York, which carrier carried the same safely and promptly and delivered it to the Metropolitan Steamship Company its next succeeding carrier on the route to destination, which in turn delivered the same to the Boston & Maine Railroad Company to be carried to Lowell, Mass., and there delivered to the consignee. And that the Railroad Company under its contract was obligated to carry the mohair only to its first connecting carrier and deliver it, which it did, in good faith, and thereby became relieved of all liability for loss or damage to the plaintiff. The plaintiff excepted to this answer (p. 7) and thereupon the court ruled "that the matters and things stated in the answer and the special stipulation in the contract relied upon and the contract itself constitute no defense and the demurrer and exceptions are therefore in all things sustained, and said special answer stricken out." To this ruling the Railroad Company excepted. (P. 16.)

The case thereupon came on for trial before a jury. The plaintiff proved the delivery of the mohair to the Railroad Company and the receipt of a bill of lading, which is admitted to be a duplicate of the bill of lading attached to the defendant's pleading. (P. 10, fol. 14.) The plaintiff offered in evidence the portion of the bill of lading contained in the first paragraph quoted above. The Railroad Company then offered in evidence several of the stipulations and parts of stipulations in the bill of lading not offered in evidence by the plain-

tiff, all of which were excluded by the court and an exception was duly taken by defendant. (P. 10, fol. 15.) The plaintiff produced evidence tending to show that the mohair was not received by the Mass. Mohair Plush Co. at Lowell, Mass.

The defendant then offered in evidence the testimony in the form of depositions of several witnesses for the purpose of proving that the defendant delivered the mohair in question to the Morgan line of steamships at Galveston, Texas, and for the purpose of showing delivery by that company in New York to the Metropolitan S. S. Co., all of which was excluded by the Court upon objection of the plaintiff and exceptions saved by defendant. (P. 13, fol. 14.) The case was then submitted to the jury, upon instructions of the trial Judge, one of which was as follows:

> "You are further instructed that if you believe from a preponderance of the evidence in this case that the plaintiff J. D. Crow, on or about March 12, 1907, delivered to the defendant at Uvalde, Texas, mohair for shipment; and that the defendant received said mohair for shipment; and that the defendant received said mohair and billed the same to the Mass. Mohair Plush Co., at Lowell, Mass.: And if you further believe from a preponderance of the evidence that said mohair so delivered by plaintiff to defendant, if any, or any part of same was not delivered to the consignee, the Mass. Mohair Plush Co., at Lowell, Mass., then you will find your verdict for the plaintiff."

He also instructed the jury that the measure of damages was the difference between the market value of

the mohair at Lowell, Mass., and the freight from Uvalde to Lowell. The jury found in favor of the plaintiff for the sum of $240.91. Bills of exceptions in accordance with the Texas practice were filed raising all the points covered by the assignments of error, which are as follows (p. 106):

FIRST ERROR.

Appellant's general demurrer to plaintiff's petition was well taken, and the trial court erred in overruling it, because the cause of action being, without doubt, based upon Section 20 of the Act of Congress, approved February 4th, 1887, as amended by the act of June 29th, 1906, the court was without jurisdiction of the subject matter of the controversy, jurisdiction over such causes of action being, by Section 9 of said law, lodged with the Interstate Commerce Commission and the Federal Courts exclusively, and the Court of Civil Appeals committed error in refusing to reverse and dismiss this cause on this ground.

SECOND ERROR.

The trial court erred in overruling appellant's general demurrer to the petition, and the Court of Civil Appeals erred in sustaining that action, because the petition states no cause of action except under the act of June 29th, 1906, which act is itself in violation of the 5th and 14th Amendments of the Constitution of the United States, in this:

(*a*) In practical effect it takes the property of appellant for a private purpose, without compensation and without just cause and without due process of law.

(*b*) It is an arbitrary, capricious discrimination against appellant, and those similarly situated, and denies them the equal protection of the law.

(*c*) It is not an exercise of the authority conferred by the Federal Constitution upon Congress to regulate commerce among the states, but exceeds the authority of Congress and invades the reserved rights of the several states in violation of Articles 9 and 10 of the Federal Constitution.

THIRD ERROR.

The trial court erred in striking out appellant's special answer upon appellee's exception thereto, and the Court of Civil Appeals erred in sustaining this action, because in so doing appellant was denied an ample and valid defense based upon a lawful contract made, and fully complied with, in good faith, which contract and defense was held to be bad because in contravention of the said act of Congress of June 29th, 1906, which act and the said action of said courts in enforcing it violates the 5th Amendment to the Constitution of the United States in that the effect of it all is to take appellant's property for private purpose, without wrong or fault upon its part, without compensation, and without due process of law.

FOURTH ERROR.

The said conduct of said trial court in excluding said answer was error, and said Court of Civil Appeals erred in sustaining said action thereby denying appellant the right to urge as a defense to the action its said

contract and compliance therewith, and erred in enforcing said act of Congress of June 29th, 1906, against appellant in this case, because said law, and the action of the courts in enforcing it, violate the 14th Amendment to the Constitution of the United States in that appellant and those similarly situated are denied the free right to contract, to own, manage, and enjoy their property and conduct their business as other persons and corporations and common carriers may do, and particularly as to common carriers engaged in transportation of interstate commerce exclusively by water; and it discriminates against those who patronize such carriers. Said act is, therefore, an arbitrary and capricious classification and denies appellant and others the equal protection of the law.

FIFTH ERROR.

The trial court erred in striking out appellant's said defenses set up in its special answer, and in enforcing said act of June 29th, 1906, against appellant, and the Court of Civil Appeals erred in approving of this action, because said act is not within the purview of the authority conferred upon Congress by the Federal Constitution to regulate commerce among the states, but it exceeds that authority and invades the reserved legislative rights of the states and the people, and therefore violates Articles 9 and 10 of the Federal Constitution.

SIXTH ERROR.

The trial court erred in giving in charge to the jury the second paragraph of the general charge, and the

Court of Civil Appeals erred in approving same by affirming the judgment, which charge reads as follows:

"You are further instructed that if you believe from a preponderance of the evidence in this case that the plaintiff, J. D. Crow, on or about March 12th, 1907, delivered to the defendant at Uvalde, Texas, mohair for shipment, and that the defendant received said mohair, and billed the same to the Massachusetts Mohair Plush Company, at Lowell, Massachusetts; and if you further believe, from a preponderance of the evidence, that said mohair so delivered by plaintiff to defendant, if any, or any part of same, was not delivered to the consignee, the Massachusetts Mohair Plush Company, at Lowell, Mass., then you will find your verdict for the plaintiff."

This was error because it applied and enforced the act of Congress of June 29th, 1906, and thereby compelled appellant to reimburse appellee for the wrong and default of an entire stranger over whom appellant had no control, thus taking its property for a private purpose without just cause and without compensation and without due process of law in violation of the 5th Amendment to the Constitution of the United States.

SEVENTH ERROR.

The trial court erred in giving to the jury the charge set out in the next preceding specification of error, and in enforcing the said act of Congress of June 29th, 1906, against appellant, and the Court of Civil Appeals by affirming the judgment erred in approving said action, because said law and its enforcement is

in effect an arbitrary and capricious classification as against appellant and others similarly situated in that it is thereby denied appellant the right to contract and to operate and manage its business and have and enjoy property, as other persons and common carriers may do, and particularly as common carriers exclusively by water may do, and it discriminates against the patrons of common carriers exclusively by water, and denies appellant and others similarly situated and those who patronize carriers exclusively by water the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

Eighth Error.

The trial court erred in submitting to the jury the said charge set out in the sixth specification of error, and in enforcing against appellant the law enacted by Congress of the United States, approved June 29th, 1906, and the Court of Civil Appeals erred in approving such action by affirming the judgment of said Court, because the said Act of Congress is not within the purview of the authority granted by the Federal Constitution to Congress to regulate commerce among the states, but exceeds that authority and invades the reserved rights and powers of the states, and therefore violates Articles 9 and 10 of the Federal Constitution.

Ninth Error.

The trial court erred in giving to the jury the first paragraph of the general charge, and in enforcing

thereby against appellant the said act of Congress of June 29th, 1906, and the Court of Civil Appeals erred in approving of this conduct by affirming the case. Said charge reads as follows:—

"You are instructed by the court, that the Galveston, Harrisburg & San Antonio Railway Company, the defendant in this case, is a common carrier, and, as such common carrier, is liable to any person from whom it receives freight for transportation, and by contract agrees to transport said freight, for a valuable consideration, and bills the same from a point in one State to a point in the same or any other State of this Union, for any damage to or loss of such freight, while being so transported, not caused by the act of God or at hands of public enemy."

This was error because the effect and result is violative of the 5th and 14th Amendments of the Constitution of the United States, and of Articles 9 and 10 of the Federal Constitution for reasons particularly stated in the sixth, seventh and eighth specifications of error, where the identical questions are presented, and the same are now referred to and made a part hereof to avoid repetition.

Tenth Error.

The Court of Civil Appeals committed error in construing the Act of Congress of June 29th, 1906, to mean that the initial carrier at all events should be liable as at common law for the delivery of interstate shipments at destination, irrespective of any contract

limiting liability to its own line and its own fault, but if valid at all it should have been construed to apply only to through shipments where there is an express or implied contract on the part of the initial carrier to carry to destination.

This case brings before the court the construction and validity of the Amendment of June 29th, 1906, to Section 20 of the Interstate Commerce Law, known as the "Carmack Amendment," which reads as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.
>
> That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay

to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

This Statute was before the Court in *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S., 186. It is not our purpose to attempt to reargue that case. It is not, in our opinion, decisive of the case at bar. A wider construction of the Statute was adopted by the Courts below than that applied in the *Riverside Mills* case. This circumstance may lead the Court however to a reconsideration of some of the views expressed in the opinion in that case.

I.

The Statute did not impose upon the defendant the obligation of an insurer of the safe delivery of the goods at destination.

The only evidence of loss, injury or damage to the goods was non-delivery at Lowell.

The Court charged the jury that if they found that the goods were not delivered to the Massachusetts Mohair Plush Company at Lowell, their verdict should be for the plaintiff. (P. 15.) The defendant offered in evidence a stipulation contained in the Bill of Lading stating as follows:

> "No carrier accepting the said articles of transportation shall be liable for damage to or loss or destruction of said articles by fire or for loss, damage or delay caused by unavoidable causes or

by quarantine regulations, strikes, riots or stoppage of labor, highway robbery, wrecking of trains or by collisions or any of the dangers of navigation and perils of the sea while on seas, gulfs, lakes, rivers, or canals: Provided that this stipulation shall not exempt any carrier from liability for the negligence of its agents or servants."

The plaintiff objected to the stipulation upon the ground that under the Statute, the defendant could not limit its liability to its own line. "But by reason of the acceptance of the Mohair for such transportation became liable as at common law for its delivery to the consignees at destination and this contract to the contrary is void and tends to prove no defense, which objections were sustained and the testimony was excluded for the reasons stated in plaintiff's objections." (P. 20.)

An exception was duly taken to this ruling. (P. 20.)

This ruling was based on a construction of the Statute which finds no support in its language. We quote again the language of the Statute:

> "Any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property *caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass.*"

The Court held the defendant liable as an insurer of the safe delivery of the goods at destination. The Statute renders the defendant liable for any loss, damage or injury caused by it or by a connecting carrier. The distinction is plain. The former liability includes loss, damage or injury however caused except by the act of God or a public enemy. The latter includes only such loss, damage or injury as is caused by the initial or connecting carrier.

This distinction was not presented in the Riverside Mills case. That case came before the Court on an agreed statement of facts in which it was conceded that—

> "The goods while in the possession of the connecting carrier between the Atlantic Coast Line Railroads Terminal points and destination were lost *through the negligence of the said connecting carriers*" (Record in that case, p. 22).

The opinion in this Court proceeded on that stipulation. The opening sentence states that—

> "The goods of the defendant were lost by a connecting carrier to whom they had been safely delivered."

In this case there was no evidence that the loss was caused by the initial carrier or by any connecting carrier unless the mere failure to deliver was evidence that the loss was caused by the initial or by a connecting carrier and not by a third person. This cannot be so, unless the defendant contracted to deliver the goods at destination or the Statute imposed upon the defendant

the obligation of an insurer of the safe delivery of the goods. It is quite clear that the Statute is not intended to have that effect. This question has been incidentally considered on several occasions. In "*The Matter of Release Rates*," 13 I. C. C. R., p. 550, Commissioner Lane, commenting upon the Carmack Amendment, says:

> "In the absence of express stipulation the liability of a common carrier is not limited to loss occasioned by its negligence or other misconduct. The law has cast upon it an extraordinary responsibility. It is to a large extent an insurer of the goods entrusted to it for carriage. The rule roughly stated is that a common carrier is liable for all losses not occasioned by the Act of God or a public enemy. But the carrier's right to relieve itself to some extent from this complete responsibility by special agreement or notice has long been recognized. It may strip itself of its insurer's liability and remain responsible only for its negligence and other misconduct. (*York Mfg. Co.* v. *I. C. R. R. Co.*, 3 Wall, 107; *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall., 357.) The law on this point is well settled and a careful study of the provisions of the Hepburn Act will show that the carrier's right in this respect has not been abrogated. The law reads that a carrier shall be liable 'for any loss, damage or injury to such property caused by it . . . and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.'
>
> The scope of this probation must turn largely

upon the construction to be placed upon the word 'caused.' The word 'caused' is not susceptible of a narrow interpretation. It is broad enough to comprehend all losses due to the carrier's misconduct, whether positive or negative in character. But it cannot possibly be extended to cover losses due to causes beyond the carrier's control. We are necessarily driven to the conclusion, therefore, that the law places no restriction upon the carrier's efforts to exempt itself from liability for losses which occur without fault on its part. We are of opinion, in short, that in the absence of agreement or notice, the carrier's liability is covered by the ordinary common law rule; but that a stipulation for exemption from liability for losses due to causes beyond the carrier's control is open to no legal objection."

In *Bernard* v. *Adams Express Company*, 205 Mass., 254, Knolton, *J.*, speaking of the purpose of the Carmack Amendment, said:

> "One obvious purpose of Congress was to extend the provisions of the common law so as to make a common carrier receiving property for transportation liable for loss, damage or injury to it, not only while it is in transit over his own line, but while it is in the hands of a connecting carrier.
>
> In *Greenwald* v. *Weir*, 130 App. Div. (N. Y.), 696 (Aff'd 199 N. Y., 170), it is said that this last is the only liability imposed by the Statute. Although the liability is made statutory by the enactment, the statement of it in the words, 'for any loss, damage or injury to such property

> caused by it or by any connecting carrier, railroad or transportation company to which such property may be delivered or over whose line or lines it may pass,' includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come. The liability is only for loss, damage or injury 'caused' which, broadly interpreted, includes that resulting from the neglect as well as that due to a positive act. *It does not include the liability of an insurer against loss, for which the common carrier is not culpably chargeable.*"

Following the decision in the case last cited, the courts of other States have held that the Carmack Amendment does not restrict the right of an Express Company to stipulate as to the value of goods and to limit its liability to the value agreed upon. (*Travis* v. *Wells Fargo & Company*, 74 Atl. Rep., 444; *Wright* v. *Adams Express Company*, 43 Penn. Supr. Ct., 40; and see *Latta* v. *Chic., St. P. & M. & O. R.*, 172 Fed., 850.)

To make the initial carrier liable as an insurer of the safe delivery of the goods at destination, it would be necessary to strike from the Statute the word—"And shall be liable to the holder thereof for any loss, damage or injury to such property caused by it or by a connecting carrier," and insert in their place the words—"And shall be liable to the holder thereof for the safe delivery of the goods at such destination." The two phrases are not equivalents. The latter imposes a liability not included in the first. It renders the initial

carrier liable, not only for a loss caused by an initial or connecting carrier, but for one caused by a third party, or by an act over which the initial and connecting carrier had no control.

No obligation to carry to destination can be found in the words of the Statute, "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another shall issue a receipt or bill of lading therefor."

The plain purpose of this provision was that the initial carrier receiving goods marked for a destination in another State should furnish the shipper with a receipt or bill of lading as evidence of the terms of the contract and to avoid controversy as to the title to the property (*Wright* v. *Adams Express Company*, 43 Penn. Supr. Ct., 40–48). These words did not require that the initial carrier should contract for through carriage, since the carrier might issue *either* a receipt or a bill of lading. A receipt does not import a contract of carriage, and nothing whatever is provided as to the terms of the bill of lading. Certain it is, that the Statute was intended to apply to an initial carrier who receives goods marked for a destination beyond the State whatever might be the terms of the contract, and to subject such carrier to the liability thereafter provided by the Statute. It is equally certain, that the liability prescribed by the Statute was to answer for his own fault, or the fault of a connecting carrier, and not for the fault of a third person or for a loss which occurred without the fault of the initial or connecting carrier.

II.

By accepting the goods for transportation the defendant did not assume a contractual obligation to deliver the goods at final destination.

In the *Riverside Mills* case, it was said:

> "The indisputable effect of the Carmack Amendment is to hold the initial carrier engaged in Interstate Commerce and 'receiving property for transportation from a point in one State to a point in another State' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents."

The court of course did not mean that in that case the parties had actually so contracted because it had previously stated that they had not so contracted.

We think the court necessarily meant that the *statutory* obligation imposed was such as would have arisen if the parties had contracted for a through carriage. Again in the *Riverside Mills* case, it is said:

> "The requirement that carriers who undertook to engage in Interstate transportation and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition to continue in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation."

Again in the same opinion, it is said:

> "Reduced to the final results, the Congress has said that a receiving carrier in spite of any stipulation to the contrary, shall be deemed when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent and to incur carrier liability throughout the entire route with the right to re-imbursement for a loss not due to his own negligence."

In order to comprehend the import of these words and the underlying ground of the decision in the *Riverside Mills* case it is not out of place to restate some propositions of a general character.

(1) Suppose the Statute be regarded as read into the contract—What did the initial carrier contract to do? We answer—Not to carry the goods to destination, but to be liable for any loss, damage or injury to them caused by it or a connecting carrier. Any contractual liability created by the adoption of the Statute was necessarily limited by the terms of the Statute. A Statute cannot be extended to embrace a liability not definitely and clearly prescribed by its terms.

(2) Can it be said that the railroad company voluntarily assumed a contractual obligation to carry to destination even if that be a requirement of the Statute? Beyond dispute its actual contract was to carry only over its own line to Galveston. Possibly it may be within the competency of Congress to declare that a

railroad company attempting to engage in Interstate Commerce may be excluded therefrom unless it contracts for a through transportation. Congress might declare that a contract of an Interstate carrier which did not impose an obligation to carry to destination should be illegal and void or it might penalize a railroad company for making such a contract, but can it be that Congress by merely placing this Act upon the Statute Book can make it a part of every contract thereafter entered into by an Interstate carrier notwithstanding that the Interstate carrier definitely limits its obligation to a carriage only over its own line? The question is not whether Congress can impose an obligation to carry to destination, but whether it can make a contract to carry to destination against the expressed intention and stipulation of the parties. Whether the obligation be regarded as statutory or contractual might ordinarily be unimportant, but in this discussion it becomes important. Our contention is that Congress cannot enforce as a contractual obligation that which is merely a statutory obligation. They cannot create a contract against the will of the parties, not because it would be unconstitutional to do so, but because it is impossible to do so. The principle is well stated by an elementary writer:

> "The law frequently supplies by its implications the want of expressed agreements between the parties. But it never overcomes by implication the expressed provisions of parties. If they are illegal, the law avoids them. If they are legal, it yields to them and does not put instead what it would have put by implication if

the parties had been silent. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies had they thought of it or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make expressed provision the reason of the implication fails." (Parsons on Contracts, Star paging 515.)

(3) The rule laid down in *Muscamp* v. *Lancaster & P. R. Co.*, 8 Mess. & W. 421 to the effect that a mere receipt of property for transportation to a point beyond the line of the receiving carrier without any qualifying agreement justifies an inference of an agreement for through transportation is a rule of evidence and the inference so derived may be rebutted by proof of the actual agreement between the parties. (*Hutchinson on Carriers*, Sec. 228 *et seq.*) Congress did not attempt to establish such a rule of evidence by the Carmack Amendment. There is nothing said as to the character of the receipt to be given or as to its effect. The Statute concerns itself only with the liability imposed upon the initial carrier irrespective of the terms of the receipt. Much less does the Statute attempt to make a receipt or bill of lading conclusive evidence of a contract for through carriage. If it had attempted to do so, it may well be doubted whether the attempt would have been legal (*Chicago R. Co.* v. *Minnesota*, 134 U. S., 418). In *Howard* v. *Moot*, 64 N. Y., 262–268, Mr. Justice Allen said:

"It may be conceded for all the purposes of this appeal that a law that should make evi-

> dence conclusive which was not so necessarily in and of itself and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights."

This language has been quoted and applied (*Meyer* v. *Berlandi*, 39 Minn., 438; *Railway Co.* v. *Simonson*, 64 Kan., 802), and see Wigmore on Evidence, Sec. 1354.

(4) Another consideration, not without weight, is found in the common law obligations of the defendant as a common carrier. The common law imposes upon the carrier the obligation to receive and carry the goods tendered to it for transportation over its own line even though marked for a destination beyond its own line. Mr. Justice Richards, writing the opinion of the Court in *United States* v. *Geddes*, 131 Fed., 452–456, speaking of an intrastate railroad, said :

> "It is bound to receive and transport from one point to another on its line freight offered for transportation regardless of the origin or destination of the freight."

And this is the law in the State of Texas and in other States. (*Inman* v. *St. Louis S. W. Railroad*, 14 Texas Civil appeals; *Seasongood* v. *Tennessee O. R. Company*, 21 Ky. L. R., 1142), and the performance of this duty may be compelled by mandamus.

So. Ex. Co. v. *R. M. Rose Co.*, 5 L. R. A., 619, s. c., 124 Ga., 581.

The common law also imposes upon the carrier the duty of delivery of the goods to the succeeding carrier, where they are received for transportation to a point beyond the initial carrier's line. (*Michigan Central Railroad Company* v. *Mineral Springs Mfg. Co.*, 16 Wall., 318; *Tift* v. *Southern Railroad*, 123 Fed., 789; *Rawson* v. *Holland*, 59 N. Y., 611.) This is an obligation from which the carrier cannot release himself. As was said by Mr. Justice Davis in *Michigan Central Railroad Co.* v. *Mineral Springs Mfg. Co., supra:*

> " Public policy however requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route without delivering or attempt to deliver to the connecting carrier."

These obligations of the common law are made statutory as to Interstate Commerce by the provisions of the Interstate Commerce law. By the first section of that Act the term " transportation " as employed in the Act is defined to include all services in connection with the delivery of property transported, and it is made

> " the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

The third section of the Act reads as follows:

> " Every common carrier subject to the provisions of this Act shall according to their respective powers afford all reasonable, proper

and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith and shall not discriminate in their rates and charges between such connecting lines."

Whether the Interstate Commerce law, previous to the amendments of 1910, did or did not require the establishment of through rates, it certainly did impose upon the carrier of Interstate Commerce the obligation to receive goods offered for shipment as at common law, and also the obligation to deliver at the termination of the carrier's route to the next succeeding carrier.

Since the initial carrier was under the legal obligation to receive and carry the goods over its own line, although marked to a destination in another State, and was likewise under the legal obligation to deliver the goods to the succeeding carrier, no inference can be drawn from the mere receipt of the goods that the Railroad Company intended to contract to carry the goods to destination, because of the existence upon the Statute book of the Carmack Amendment. Its act was not voluntary, but compulsory, and therefore there can be found no element of intention of adopting the Statute as a condition of entering into the employment.

Moreover, the Railroad Company then claimed and now claims that the statutory obligation was invalid because it was beyond the constitutional power of Con-

gress to impose it. It is not estopped from denying the validity of the statute. If as we are about to show it is invalid, the Railroad Company cannot be assumed to have adopted it as a part of its contract. If unconstitutional it was void, and therefore in the eye of the law it did not appear upon the statute book, and could not be read into a contract, because it was non-existent. Even if Congress has required that it should be inserted in the contract it would not have been operative.

> "It is not in the power of the Legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates." (*People ex rel. Rogers* v. *Coler*, 166 N. Y., 19.)

Much less will an unconstitutional Statute be regarded as inserted in the contract by implication. (*Cleveland* v. *Clements Bros. Construction Company*, 65 N. E., 885; 59 L. R. A., 775; *Palmer* v. *Tingley*, 45 N. E., 313.)

Considering the language of the statute, the terms of the contract and the general principles of law applicable as above recited and also the facts conceded in the *Riverside Mills* case, notwithstanding some observations in the opinion in that case which seem to have a contrary trend, we think that it must be conceded that no contractual obligation to deliver the goods at Lowell was entered into by the initial carrier.

III.

The mere failure of the last connecting carrier to deliver the goods at Lowell was not evidence of a loss of the goods caused by the initial carrier or a connecting carrier.

It is unquestionably true that where a carrier has received goods for carriage, a failure to deliver them at destination in compliance with the contract or obligation of the carrier, renders it liable in an action for a breach of contract or *in assumpsit* for a breach of duty. In either form of action the liability arises out of the obligation assumed. (*Hutchinson on Carriers*, Sec. 1321, *et seq.;* 6 Cyc., p. 474.) In the case at bar, as we have already shown, the contract imposed no obligation to deliver the goods at Lowell and the statute imposed no such obligation. The whole duty of the defendant was performed when it delivered the goods to the connecting carrier at Galveston, and thereafter there remained only such obligation as the statute imposed, which was a liablity for any loss, damage or injury caused by it or by any connecting carrier. Certainly no case can be found where a carrier has been held liable for damages because goods failed to reach a certain destination, unless the carrier was under a contractual obligation, express or implied, to carry to that destination. Here the Railroad Company offered to show that it had delivered the goods to a connecting carrier in accordance with the terms of its contract. The Court refused to permit it to show such delivery under its contract and admitted evidence which tended to show, although very inconclusively, that the goods were not received by the con-

signee. There was no allegation and evidence that the failure to deliver at Lowell to the Massachusetts Mohair Plush Company was caused by the initial carrier or by any connecting carrier. It might have been caused without the negligence of the initial or connecting carrier by a third person or by an event over which they had no control. There was therefore no compliance with the requirement of the statute and no cause of action made out under the statute. It is a well-established rule that to recover upon a statutory liability, the plaintiff must allege and prove each of the facts essential to establish such statutory liability. (*31 Cyclopedia of Law*, *Ricks* v. *Reed*, 19 Cal., 551; *Blake* v. *Russell*, 77 Me., 492; *Hale* v. *Miss. P. R. Co.*, 36 Neb., 266; *Hall* v. *Palmer*, 54 Mich., 217.)

As we have said before in the *Riverside Mills* case, it was conceded that the loss of the goods was due to the negligence of the connecting carrier. That case was, therefore, brought directly within the language of the statute.

IV.

The Statute as construed and enforced by the Texas courts is unconstitutional because it deprives the defendant of its property without due process of law.

The Texas courts construed the Statute as imposing upon the initial carrier a liability for the loss of the goods irrespective of any act of its own or of any connecting carrier upon mere proof of the failure to deliver at the destination marked on the package, not-

withstanding that it affirmatively appeared that the defendant had contracted only to carry over its own line and that the plaintiff had stipulated that neither the defendant nor any connecting carrier should be liable for a loss arising otherwise than through the negligence of the initial carrier or a connecting carrier. Under these circumstances, there can be no pretense that the initial carrier was held liable merely for a loss caused by it or by its agents or servants. It was as fairly to be presumed that the goods were lost or destroyed by the agency of a third person as it was that they were lost or destroyed by the agency of a connecting carrier. The question, therefore, is whether the Legislature can make one person liable for the act of another over which it has no control. The answer to this question admits of no uncertainty, unless the power of Congress is arbitrary and unlimited. In the Riverside Mills case the defendant was held liable on the concession that the loss had arisen from the negligence of a connecting carrier upon the theory that the connecting carrier was an agent of the initial carrier. In the case at bar, the defendant was held liable not by reason of any fault of its own or the connecting carrier, but as an insurer of the safe delivery of the goods at a destination beyond its line to which it had not contracted for transportation.

This was a violation of the delendant's constitutional rights, and the protection of the constitution was invoked in the courts below, and is now urged in this court under the Fifth and Sixth Assignments of Error.

Moreover, if it be true, as we have shown above, that

the defendant came under no contractual obligation to deliver the goods at Lowell, and the Statute imposed such an obligation, then the act is unconstitutional because it requires the initial carrier to answer for a wrong done by a connecting carrier for whose act it is in no way responsible, since it is quite impossible that the Statute could constitutionally make the connecting carrier the agent of the initial carrier against the will of the latter, and then on the theory of such agency hold it liable for wrongful act of the connecting carrier.

It is uniformly agreed that Congress cannot, without violating the 5th amendment, nor can any State legislature, without violating the 14th amendment, take the property of one person and give it to another, nor can either legislative body effect this by establishing forms of law with or without notice. Mr. Justice Story speaking for this Court in *Wilkinson* v. *Leland*, 2 Peters, 627–658, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held to be a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every tribunal."

"If the Legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death, but none of these things can be done by mere legislation." (*Taylor* v. *Porter*, 4 Hill, 140.)

"A judicial proceeding by which private property is taken for private use does not afford due process of

law. No power in the State can legally confer upon one person or class of persons the property of another person or class without their consent, whatever motives of public policy may exist in favor of such transfer." (*Westervelt* v. *Gregg*, 2 N. Y., 202–212.)

It is not within the scope of legislative authority, either with or without compensation, to take the property of one and give it to another. Mr. Justice Brown in *Holden* v. *Hardy*, 169 U. S., 369–390, said:

"Recognizing the difficulty of defining with exactness the due process of law, it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property shall be taken for the benefit of another, or for the benefit of a State without compensation."

These familiar citations find corroboration and support in recent decisions of this Court. (*Louisville and W. R. Co.* v. *Stock Yards Co.*, 212 U. S., 132; *Smyth* v. *Ames*, 169 U. S., 466; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S., 463.)

(1) But it is said that this legislation may be sustained because Congress, under the commerce clause of the Constitution, has plenary power over interstate commerce and may prescribe the terms and conditions upon which any person may engage in such commerce.

The answer to this was that the Constitution was intended to establish a harmonious system by which no

power was lodged in any department of the Government which could be exercised to the subversion of civil liberty which it was the main object of that instrument to guard. With clear perception of this controlling principle Chief Justice Marshall, in that celebrated definition of the legislative grant of power under the commerce clause, contained in his opinion in *Gibbons* v. *Ogden*, 9 Wheat., 196, said:

"This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations *other than those prescribed in the Constitution.*"

That there are limits upon the exercise of this power contained in the Constitution, has been frequently recognized by this court. Thus in *Monongahela Navigation Co.* v. *United States*, 148 U. S., 310, it was held:

"That the right of the National Government to condemn and appropriate land for purposes of interstate commerce is subject to the limitations imposed by the 5th amendment; that private property shall not be taken for public use without just compensation."

The argument that one who engages in Interstate Commerce thereby submits himself to every regulation of commerce imposed by Congress, has been previously urged in this court without success. In the Employers' Liability case, 207 U. S., Mr. Justice White, writing the opinion of the court, said: "To state the proposition is to refute it. It assumes that because one engages in Interstate Commerce he thereby endows

Congress with power not delegated to it by the Constitution . . . It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in Interstate Commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress."

As was said by Chief Justice Baldwin in *Hoxie* v. *N. Y. & N. H. R. Co.*, 82 Conn., 356: "The right to engage in commerce between the States is not a right created by or under the constitution of the United States. It existed long before the constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the articles of confederation (Art. IV), and impliedly guaranteed by Art. IV, Sec. 2, of the Constitution of the United States as a privilege inherent in American citizenship. (*Slaughter House Cases*, 16 Wall., 36, 75; *Gibbons* v. *Ogden*, 9 Wheat., 1, 211: *Crandall* v. *Nevada*, 6 Wall., 35; *Lottery Cases*, 188 U. S., 321, 362; *Employers' Liability Cases*, 207 U. S., 463, 502.)"

It can no longer be doubted that the rights intended to be protected under the phrase "due process of law," in the 5th amendment, are the same rights which are protected from invasion by the States by the same phrase in the 14th amendment. If, then, the power to regulate commerce is subject to the limitations of "due

process of law," the decisions of this court defining instances in which State legislation have violated the rights so protected, if appropriate, as bearing upon the subject of regulation of interstate commerce, are of weight and authority.

Consequently, those cases in which it has been held that State legislation imposing rates of tariff confiscatory in character, violate the constitutional requirement of "due process of law" as invading property rights, are equally applicable to Congressional legislation based on the commerce clause if it otherwise violates property rights. (*Smith* v. *Ames*, 169 U. S., 466.)

In *Lake Shore & M. S. R. R. Co.* v. *Smith*, 173 U. S., p. 685, where the State of Michigan undertook to compel railroad companies to issue mileage tickets at certain rates for the use of the purchaser and his family, less than those established for general trade, this court, speaking through Mr. Justice Peckham, made use of the following language:

"A railroad company although a quasi public corporation, and although it operates a public highway, (*Cherokee Nation* v. *Southern Kansas Railway Co.*, 143 U. S., 641; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S., 285–301,) has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth* v. *Ames*, (169 U. S., 464.) A corporation is a person within the protection of the 14th amendment. (*Minneapolis & St., Louis R. R. Co.* v. *Beckwith*, 129 U. S., 26; *Smyth* v. *Ames*, 169 U. S., 522–526.) Although it is under Governmental control, that control must be exercised

with due regard to constitutional guarantees for the protection of its property."

And again:

"If the legislature can interfere by directing the sale of tickets at less than the general established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment and caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or class of persons over its road and compel it to transport free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of a corporation."

So in *Louisville & N. Y. Co.* v. *Stock Yards Co.*, 212 U. S., 131, where the State of Kentucky, by its Constitution, undertook to compel a railroad company upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary point near its terminus by a competing road for the purpose of reaching and using the former's terminal facilities, this court held this

part of the Constitution invalid as taking the company's property without due process of law.

So also it has been held that "A City Ordinance requiring a Street Railroad Company to accept transfers issued to passengers by other companies in no way connected with it and to carry such passengers over its lines without charge is unconstitutional and void as depriving such company of its property without due process of law, and it is immaterial that the requirement is reciprocal and that in operation the effect of the ordinance might be to increase the business to such an extent that the company would suffer no loss."

Chicago Street Railway v. *City of Chicago*, 142 Fed., 845.

It is instructive also to consider in this connection the following cases:

Ogdensburg R. R. Co. v. *Pratt*, 89 U. S., 123.

Richmond & A. Ry. Co. v. *R. A. Patterson Tobacco Co.*, 196 U. S., 163.

Missouri, Kansas & Texas Ry. Co. v. *McCann*, 174 U. S., 58, and

Central of Georgia R. R. Co. v. *Murphy*, 160 U. S., 195.

In the first three of which State statutes were so construed as not to be open to the objection which we are here urging, and is it not impliedly conceded that if they had been open to such objection this court would have felt obliged to condemn the legislation? In

the last case cited (the Tracer case) it was held that a burden was imposed by the State upon interstate commerce which was unreasonable, and for that reason unconstitutional.

(2) It may be argued that this is merely an extension of an obligation imposed upon common carriers at common law to carry in safety, and that since, under the common law, they may be made responsible for loss or damage to property where they are in no wise to blame, the initial carrier may be made responsible for losses which occur beyond its line, although not in fault. But this confuses things fundamentally different. Doubtless the law does impose upon a common carrier liability for losses arising from acts beyond his own control while the goods are in his possession (*Chicago, M. & St. P. R. Co.* v. *Solan*, 169 U. S., 133), but this liability comes into existence only when the goods are placed in the exclusive possession of the carrier. (*Hutchinson on Carriers*, Section 105.) The justice of the rule rests upon the dominion which the carrier has over the property while in his possession, enabling him to safeguard it to the very utmost. But when the property passes beyond his control, and he has ceased to have power over it or over those in charge of it, the common law liability of the carrier as an insurer ceases, and to re-impose it upon him so long as the property is both actually and constructively beyond his control, is a palpable act of injustice for which no warrant or precedent can be found.

So it is said that the Legislature may impose upon a master a liability for injuries sustained by a servant through the fault of a co-servant, although for this he was not liable at common law. (*Missouri Pacific R. Co.* v. *Mackey*, 127 U. S., 205; *Minnesota Iron Co.* v. *Kline*, 199 U. S., 593.) From this it is argued that similarly an initial carrier may be made liable for the defaults of a connecting carrier.

But this again fails to distinguish fundamental differences. It is one thing to make a master liable for the acts of a servant under his control, whether the injury inflicted be upon a stranger or upon a co-servant; it is another thing to make a person liable for the conduct of another person over whom he has no control. In the case at bar, as construed by the Texas Courts, the initial carrier is made responsible for the acts of persons who are neither his agents nor under his control, and for events due neither to his act or to the acts of connecting carriers.

But it may be said that the connecting carrier is in some sense associated with the initial carrier because a through rate of freight was stipulated, and therefore the initial carrier may be made liable for a loss occurring on the line of a connecting carrier. But here again there is a failure of discrimination. A through rate does not necessarily indicate an agreement for a through carriage, and if it did, then the liability of the initial carrier would rest upon his obligation by contract as a carrier over the entire route to destination. It would rest upon the initial carrier's contract and not upon the Statute.

It is the duty of the connecting carrier to take the cars delivered to it by the initial carrier, and it is not rendered liable for any alleged wrongful act of the initial carrier merely because of the adoption of a joint through rate. (*Penn. Ref. Co.* v. *West N. Y. & P. R. R. Co.*. 208 U. S., 208, 222.)

"No power existed at common law and none is given by the act (Commerce Act) to court or commission to compel connecting companies to contract with each other to abandon full control of their connecting roads or to unite in a joint tariff." (*Chicago & N. W. Ry. Co.* v. *Osborn*, 52 Fed., 912.)

The joint liability must result from some contract or agreement which would constitute them joint contractors or partners. (*Wilson* v. *L. & N. R. Co.*, 103 N. Y. App. Div., 203.)

Now, the mere existence of a through tariff rate furnishes no evidence of association or connection between the succeeding carrier, and if it did, the evidence would go to show an obligation upon the initial carrier by contract and would not in any way help the argument that the initial carrier could be made liable otherwise than by contract.

V.

The remedy attempted to be given by the Statute to the initial carrier against a connecting carrier in case of payment of loss is unconstitutional and therefore the Statute is wholly void.

The glaring injustice of making the initial carrier liable for the act of a connecting carrier with which it has no contractual relation, over which it has no control, and for the negligence of which it has no moral responsibility, makes it self evident that the Congress would have enacted no such provision of law had it not supposed it was legally protecting the first carrier, which it had made primarily liable, by affording it a certain and conclusive remedy against the connecting carrier for whose default the initial carrier had fully paid the shipper. It is too palpable to be questioned that but for the belief that the language employed in the Carmack Amendment secured to the first carrier such a remedy, it would not have been enacted. This brings us to the question—Has the Congress secured to the initial carrier which it requires to respond to the shipper any valid remedy against the connecting carrier upon whose line or lines the loss or damage shall have occurred? The words of the statute are:

> "That the common carrier, railroad or transportation company issuing such receipt or bill of lading *shall* be entitled to *recover* from the common carrier, railroad or transportation company *on whose line* the loss, damage or injury shall have been sustained *the amount of* such loss, damage or injury as it may be required to

> pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof."

The purpose of Congress is clear, but the method which it provided is at war with the Constitution.

The initial carrier, the goods having been lost, damaged or injured, on the road of some one of the connecting carriers, is called upon by the owner to make good the loss. It may settle with the shipper, taking a receipt, or it may refuse to pay and may submit to suit by the shipper. Then if judgment is obtained against it it *must* pay. If the settlement is a voluntary one, the law provides that the initial carrier may recover against a connecting carrier on the basis of the receipt taken by it from the shipper. If on that receipt suit is brought, as the law evidently contemplates, is the connecting carrier which has been at fault bound to pay upon the basis of that receipt? Could Congress make that receipt as against the defaulting carrier conclusive? If it were not conclusive, as it could not be, defense is open to the defaulting carrier as to whether the loss, injury or damage was caused by its negligence, as to whether it occurred on its road and as to the amount of loss, damage or injury, and it might very well happen that the recovery by the initial carrier would be less than the sum which it had paid to the shipper. The difference between what it paid the shipper and what it recovered from the defaulting carrier would be an undisguised spoliation of the initial carrier who is in no manner liable for the debt except by the

mandate of the statute. If the shipper recovered a judgment against the initial carrier for the amount of loss, damage or injury—would this Act of Congress be efficient to bind the defaulting carrier by that judgment? If so, to this complexion have we come at last that by an Act of Congress the defaulting carrier is bound by a judgment rendered in a suit to which it was not a party. Is this within the constitutional competency of the Congress? The truth seems to be that from no standpoint can this remedy in respect of its constitutionality or adequacy be sustained. It does not seem to help the situation to say that such matters are usually adjustable between the carriers. The act does not attempt to place the parties under constraint in respect of arbitrating and promptly adjusting by voluntary arrangement such claims as are covered by this provision. The Congress has not dealt with it upon that basis. Congress has either created a right which is susceptible of constitutional enforcement or if it has not, the act is bad and the belief upon the part of Congress that the matters would be adjusted as railway matters frequently are between connecting carriers cannot render the provision valid. The situation created here is *sui generis*.

If the provision of the Carmack Amendment for a recovery over by the initial carrier from the connecting carrier in default had been known by the Congress to be invalid, and therefore utterly inefficient in law—is it not beyond question that no such primary liability would have been imposed upon the initial carrier? If it be true, as we contend it is, that the remedy over

which the act attempts to give to the initial carrier is unconstitutional, the Amendment must fall, although upon well established principles, it would not affect the validity of any other provision in the Interstate Commerce Act of 1906.

The rule applicable in such cases is laid down by Chief Justice Shaw in *Warren* v. *Charleston*, 2 Gray, 84. If the different parts of the Statute "are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

This rule was applied in the Income Tax Cases (*Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S., 634, 636) and in the Employers Liability case (*Howard* v. *The Illinois Central Railroad*, 207 U. S., 461), and in the Trade Mark cases, 100 U. S., 82. (See *International L. B. Co.* v. *Pigg*, 217 U. S., 113.) It was said in *Smeltzer* v. *St. Louis & S. F. R. Co.*, 158 Fed., 660, that the constitutionality of the last paragraph of the Statute is not involved in an action brought by a shipper against the initial carrier and that it can be raised only in an action to enforce the remedy against a connecting carrier. But if the remedy was a consideration for the obligation, then, if the consideration fails, the obligation likewise fails.

VI.

If the Railroad Company came under any obligation to the shipper for the through carriage of the goods, then the Court erred in excluding the defense of the release by the shipper of the Railroad Company from liability for loss or injury to the goods not occasioned by its own negligence or that of a connecting carrier.

By the bill of lading it was provided that no carrier accepting the goods in question for transportation should be liable for damages arising from certain specified causes, excluding those arising from negligence on the part of such carrier or its servants. (Pars. 3, 4, 5 of the bill of lading, pp. 3, 4.) If the contract was one for through carriage, these stipulations formed part of the contract. The connecting carriers were then agents of the initial carrier, and it might stipulate for exemption from liability except for its own negligence.

These provisions of the bill of lading were excluded when offered in evidence. (P. 10, fol. 15.)

The Court charged the jury in this respect on this subject as follows:

> "You are instructed by the Court that the Galveston, Harrisburg and San Antonio Railway Company, the defendant in this case, is a common carrier and as such common carrier is liable to any person who delivers freight to it or its duly authorized agents for transportation from a point in one state to a point in the same or any other state in this Union, said freight being received by said defendant at the one point and billed by it to the other point for any damages or loss

> occurring to said freight after such receipt and before the delivery to the consignor at the point of destination, provided such damage was not caused by some act of God or at the hands of the public enemy." (P. 16.)

To this charge exception was taken, and the error is presented by the Fifth Assignment of Errors. (P. 30.)

It is true that the burden of proof is ordinarily upon the carrier to bring itself within the exceptions of the bill of lading, but where these exceptions are ruled out as a defense before any proof can be offered, it is unnecessary for the carrier to tender proof, since he is not called upon to do a useless thing. It must be assumed, therefore, for the purposes of this argument, that it was possible for the carrier to have shown that the loss came about otherwise than through its own negligence or the negligence of one of the connecting carriers. Therefore, the question is presented whether the carrier was precluded by the Statute in question from making such liability.

As we have already stated, the Interstate Commerce Commission expressed the opinion that under this Statute "a stipulation for exemption from liability for losses due to causes beyond the carrier's control is grounded upon a construction of the words of the Statute 'caused by it' or the connecting carrier."

This construction of the statute was also adopted by the Appellate Division of the First Department of the Supreme Court of the State of New York in the case of *Greenwald* v. *Weir*, 130 N. Y. App. Div., 696.

If this be the true construction of the Statute, then it follows that the Court erred in excluding this defense.

This necessarily presents a federal question because the defense was ruled out as being in contravention of the Act of Congress of June, 1906. (Bill of Exceptions, No. 1, p. 20.)

VII.

The court below erred in refusing to give effect to the stipulation of the contract making the measure of damages the value and price of the articles at the place and time of shipment.

The bill of lading contained the following provisions:

> "It is further stipulated that in the event of loss, detriment or damage done to or sustained by the property herein mentioned during transportation from place of shipment to place of destination, that in assuming the amount of loss or damage so occurring, so far as it shall fall on the Galveston, Harrisburg & San Antonio Ry. Co., or any common carrier accepting certain articles for transportation under this bill of lading, the value and price of the article herein mentioned, the place and time of shipment under this bill of lading shall be taken as the true price and value thereof."

The court overruled the answer setting up the bill of lading containing this stipulation and excluded the offer of it in evidence at the trial, and charged the jury "that the measure of damages was the difference between the market value of the goods at Lowell and the

freight between Uvalde, Texas, and Lowell" thus substituting the value of the goods at the place of destination for the value of the goods at the place of shipment as the measure of damages.

The stipulation that in the event of loss the amount of damages recoverable shall be the market value of the goods at the place and time of shipment if freely and fairly entered into, is valid under the decisions of the United States Court as well as under the decisions of the courts of most of the States of the Union, although the courts in Texas hold that such a provision is invalid so far as it affects the company's liability for a loss caused by negligence. (*Southern Pacific Ry. Co.* v. *Maddox*, 75 Texas, 300.) This question, however, being one of general commercial law and not governed by statute this Court will be governed by its own decisions and the reasons which control its action.

Michigan Cent. Ry. v. *Myrick*, 107 U. S., 102.

N. Y. C. R. R. Co. v. *Lockwood*, 17 Wall., 357.

The right of a carrier to make an agreement in good faith with the shipper, fixing the valuation in case of loss, was carefully considered by this court, and adjudged in the case of *Hart* v. *Penna. R. R. Co.*, 112 U. S., 331. The authorities following this decision are collected in the opinion "In the Matter of Released Rate, 13 I. C. R., 559."

It was not the purpose of the Carmack Amendment to change this rule of law. That Amendment was designed only to forbid the making of a contract exempt-

ing the carrier from the liability imposed by the Statute, that is, from the liability from loss, damage or injury sustained by goods of the shipper upon the connecting line. (*Greenwald* v. *Weir*, 130 N. Y. App. Div., 696; *In the Matter of Release Rates*, 13 I. C. R., 550.)

It follows, therefore, that if the stipulation in the bill of lading making the value of the goods at the place of shipment the measure of damage is inoperative it must be because of the overruling force of the federal Statute, and hence a federal question is presented.

VIII.

The right of action was created by the Statute and jurisdiction to entertain it was conferred exclusively upon the federal Courts.

By Section 9 of the Interstate Commerce Law it is provided:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this law, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States in its jurisdiction, but such person or persons shall not have the right to pursue both of such remedies, and must in each case elect which one of the two methods of procedure herein provided for him or them, will adopt."

As we have seen, the right of action in this case is merely statutory and does not exist at common law, since it is not predicated upon contract made by the Railroad Company, or upon any liability assumed by that company or imposed upon it as a carrier of goods. The right of action, if any exists, is in the nature of an obligation imposed for engaging in interstate commerce by undertaking to deliver, on behalf of the shipper, goods at the termination of the carrier's route within the State where he received them to another carrier to be transported beyond the State.

The State courts have not concurrent jurisdiction with Federal courts of suits brought on a statutory liability under the Interstate Commerce Law. The jurisdiction is exclusively in the Federal Court. (*Sheldon* v. *Wabash R. R. Co.*, 105 Federal, 785; *Van Patten* v. *Chicago, M. & St. Paul R. Co.*, 74 Federal, 901; *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Assn.*, C. C. A., 165 Federal, 1–9.)

Since the right of recovery rests upon a federal statute a federal question is necessarily involved (*Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S., 1.) Adjudicating upon the jurisdiction of state courts under the Act of 1908 releasing employees of railroad companies engaged in Interstate Commerce from the operation of the common law rule of contributory negligence and from the co-servant rule, Chief Justice Baldwin in *Hoxie* v. *N. Y. & N. H. R. R. Co.*, 82 Conn., said:

> "The remedy is by plenary action. If we understand correctly the position of the Supreme Court of the United States no part of the

judicial power of the United States when it is to be exercised in the form of an original plenary action can be vested in any court not created by the United States. In *Martin* v. *Hunter's Lessees*, 1 Wheat., 304–330, it was stated that 'Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.' *Houston* v. *Moore*, 5 Wheat., 1–27, which reaffirms this postion, was subject of consideration in *Claflin* v. *Houseman*, 93 U. S., 130, 141, where it was held to have decided 'Not that Congress could confer jurisdiction in the state courts, but that these courts might exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the federal courts.' (*Robertson* v. *Baldwin*, 165 U. S., 275 279.)"

IX.

The judgment should be reversed and a new trial be ordered.

MAXWELL EVARTS,
JAMES L. BISHOP,
Counsel for Plaintiff in Error.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* WALLACE.

SAME *v.* CROW.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Nos. 108, 109. Submitted December 15, 1911.—Decided February 19, 1912.

Damages caused by failure to deliver goods is not traceable to a violation of the Interstate Commerce Law, and is not within the provisions of §§ 8 and 9 of the act; the jurisdiction of the commission and the United States courts is not exclusive. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, distinguished.

While statutes have no extra-territorial operation and courts of one government cannot enforce the penal laws of another, state courts have jurisdiction of civil and transitory actions created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which it is brought.

Jurisdiction is not defeated by implication; and there is no presumption that Congress intends to prevent state courts from exercising jurisdiction already possessed by them, and under which they have power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 637.

When a Federal statute creating an action, such as the Carmack amendment, is silent on the subject of jurisdiction, the presumption is that the action may be asserted in a state, as well as in a Federal, court.

The Carmack amendment to the Hepburn act of June 29, 1906, 34 Stat. 584, 595, c. 3591, is not unconstitutional. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.

Quære, and not determinable in this action, as the carrier failed to plead or prove the cause of non-delivery, whether the Carmack amendment makes the initial carrier an insurer, or deprives it of the right to contract with the shipper against liability for damages not caused by its own or the connecting carrier's negligence.

Under the Carmack amendment, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another

State, it is conclusively treated as having made a through contract, *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; it thereby elects to treat connecting carriers as its agents and the presumptions are that if goods are lost the loss results from the negligence of itself or of its agents.

Under the Carmack amendment, when a carrier accepts goods for shipment to a point on another line in another State, the burden of proof falls on it as the initial carrier to prove that the loss has not resulted from some cause for which it is in law or by contract responsible.

THE facts, which involve the liability of an initial common carrier for non-delivery of goods by the connecting carrier, are stated in the opinion.

Mr. Maxwell Evarts and *Mr. James L. Bishop* for plaintiffs in error:

Plaintiff in error does not attempt to reargue *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, but contends that the Carmack amendment did not impose upon the initial carrier the obligation of an insurer of the safe delivery of the goods at destination.

There was no evidence that the loss was caused by the initial carrier or by any connecting carrier unless the mere failure to deliver was evidence that the loss was not caused by a third person. This cannot be so, unless the carrier contracted for, or the statute imposed, the obligation of an insurer of safe delivery at destination. *Matter of Release Rates*, 13 I. C. C. R., 550; *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254.

The statute does not include the liability of an insurer against loss, for which the common carrier is not culpably chargeable. It does not restrict the right of an express company to stipulate as to the value of goods and to limit its liability to the value agreed upon. *Travis* v. *Wells, Fargo & Company*, 74 Atl. Rep. 444; *Wright* v. *Adams Express Company*, 43 Pa. Supr. Ct. 40; and see *Latta* v. *Chic., St. P., M. & O. R.*, 172 Fed. Rep. 850.

By accepting the goods for transportation the defendant did not assume a contractual obligation to deliver the goods at final destination. *Muscamp* v. *Lancaster & P. R. R. Co.*, 8 Mees. & W. 421; Hutchinson on Carriers, §§ 228 *et seq.* The statute does not attempt to make a receipt or bill of lading conclusive evidence of a contract for through carriage. If it had attempted to do so, it may well be doubted whether the attempt would have been legal. *Chicago R. Co.* v. *Minnesota*, 134 U. S. 418; *Howard* v. *Moot*, 64 N. Y. 262–268; *Meyer* v. *Berlandi*, 39 Minnesota, 438; *Railway Co.* v. *Simonson*, 64 Kansas, 802; Wigmore on Evidence, § 1354.

The common law imposes upon the carrier the obligation to receive and carry the goods tendered to it for transportation over its own line even though marked for a destination beyond its own line. *United States* v. *Geddes*, 131 Fed. Rep. 452, 458.

This is the law in Texas and in other States. *Inman* v. *St. Louis S. W. R. R.*, 14 Tex. Civ. App. 39; *Seasongood* v. *Tennessee O. R. Company*, 21 Ky. L. R. 1142; and the performance of this duty may be compelled by mandamus. *So. Ex. Co.* v. *R. M. Rose Co.*, 124 Georgia, 581.

The common law also imposes upon the carrier the duty of delivery of the goods to the succeeding carrier, where they are received for transportation to a point beyond the initial carrier's line. *Michigan Cent. R. R. Co.* v. *Mineral Springs Mfg. Co.*, 16 Wall. 318; *Tift* v. *Southern Railroad*, 123 Fed. Rep. 789; *Rawson* v. *Holland*, 59 N. Y. 611. This is an obligation from which the carrier cannot release himself. Public policy, however, requires that the rule should be enforced.

These obligations of the common law are made statutory as to interstate commerce by the provisions of the Interstate Commerce Law.

Since the initial carrier was under the legal obligation to receive and carry the goods over its own line, although

marked to a destination in another State, and was likewise under the legal obligation to deliver the goods to the succeeding carrier, no inference can be drawn from the mere receipt of the goods that the railroad company intended to contract to carry the goods to destination, because of the existence upon the statute book of the Carmack amendment. Its act was not voluntary, but compulsory, and therefore there can be found no element of intention of adopting the statute as a condition of entering into the employment.

The railroad company when this bill of lading was issued claimed the statute was unconstitutional, and a statute claimed to be unconstitutional will not be regarded as inserted in the contract by implication. *Cleveland* v. *Clements Bros. Cons. Co.*, 65 N. E. Rep. 885; *S. C.*, 59 L. R. A. 775; *Palmer* v. *Tingley*, 45 N. E. Rep. 313.

The mere failure of the last connecting carrier to deliver the goods at destination was not evidence of a loss of the goods caused by the initial carrier or a connecting carrier.

To recover upon a statutory liability, the plaintiff must allege and prove each of the facts essential to establish such statutory liability. 31 Cyc.; *Richs* v. *Reed*, 19 California, 551; *Blake* v. *Russell*, 77 Maine, 492; *Hale* v. *Miss. P. R. Co.*, 36 Nebraska, 266; *Hall* v. *Palmer*, 54 Michigan, 217.

In the *Riverside Mills Case*, it was conceded that the loss of the goods was due to the negligence of the connecting carrier.

The statute as construed and enforced by the Texas courts is unconstitutional because it deprives the defendant of its property without due process of law. It has been held liable not by reason of any fault of its own or the connecting carrier, but as an insurer of the safe delivery of the goods at a destination beyond its line to which it had not contracted for transportation.

The act is unconstitutional because it requires the initial carrier to answer for a wrong done by a connecting carrier for whose act it is in no way responsible, since it is quite impossible that the statute could constitutionally make the connecting carrier the agent of the initial carrier against the will of the latter, and then on the theory of such agency hold it liable for wrongful act of the connecting carrier.

Congress cannot, without violating the Fifth Amendment, nor can any state legislature, without violating the Fourteenth Amendment, take the property of one person and give it to another, nor can either legislative body effect this by establishing forms of law with or without notice. *Wilkinson* v. *Leland*, 2 Pet. 627, 658; *Taylor* v. *Porter*, 4 Hill, 140; *Westervelt* v. *Gregg*, 2 N. Y. 202, 212; *Holden* v. *Hardy*, 169 U. S. 369, 390; *Louis. & Nash. R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132; *Smythe* v. *Ames*, 169 U. S. 466; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 463.

Nor can this legislation be sustained under the commerce clause. The Constitution was intended to establish a harmonious system by which no power was lodged in any department of the Government which could be exercised to the subversion of civil liberty.

That power, like all others vested in Congress, is subject to the limitations prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 310; *Employers' Liability Cases*, 207 U. S. 463, 502; *Hoxie* v. *N. Y. & N. H. R. Co.*, 82 Connecticut, 356.

The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before the Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by Art. IV of the Articles of Confederation, and impliedly guaranteed by Art. IV, § 2, of the Constitution of the United States as a privilege

inherent in American citizenship. *Slaughter House Cases*, 16 Wall. 36, 75; *Gibbons* v. *Ogden*, 9 Wheat. 1, 211; *Crandall* v. *Nevada*, 6 Wall. 35; *Lottery Cases*, 188 U. S. 321, 362; *Employers' Liability Cases*, 207 U. S. 463, 502.

This case is governed by the same rules as apply to cases in which it has been held that state legislation imposing rates of tariff confiscatory in character, violate the constitutional requirement of due process of law as invading property rights. *Smythe* v. *Ames*, 169 U. S. 466; *Lake Shore & M. S. R. R. Co.* v. *Smith*, 173 U. S. 685; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 143 U. S. 641; *Lake Shore & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285, 301.

A corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. Louis R. R. Co.* v. *Beckwith*, 129 U. S. 26. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property. *Chicago Street Railway* v. *Chicago*, 142 Fed. Rep. 845. It cannot be said that the connecting carrier is in some sense associated with the said initial carrier because a through rate of freight was stipulated, and therefore the initial carrier may be made liable for a loss occurring on the line of a connecting carrier. A through rate does not necessarily indicate an agreement for a through carriage, and if it did, then the liability of the initial carrier would rest upon his obligation by contract as a carrier over the entire route to destination. It would rest upon the initial carrier's contract and not upon the statute. *Penn. Ref. Co.* v. *West N. Y. & P. R. R. Co.*, 208 U. S. 208, 222; *Chicago & N. W. Ry. Co.* v. *Osborn*, 52 Fed. Rep. 912.

The joint liability must result from some contract or agreement which would constitute them joint contractors or partners. *Wilson* v. *L. & N. R. Co.*, 103 N. Y. App. Div. 203.

The remedy attempted to be given by the statute to

the initial carrier against a connecting carrier in case of payment of loss is unconstitutional and therefore the statute is wholly void. *Warren* v. *Charleston*, 2 Gray, 84; *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 634, 636; *Howard* v. *The Illinois Cent. R. R.*, 207 U. S. 461; *The Trade-Mark Cases*, 100 U. S. 82; and see *International T. B. Co.* v. *Pigg*, 217 U. S. 113; *Smeltzer* v. *St. Louis & S. F. R. Co.*, 158 Fed. Rep. 660.

If the railroad company came under any obligation to the shipper for the through carriage of the goods, then the court erred in excluding the defense of the release by the shipper of the railroad company from liability for loss or injury to the goods not occasioned by its own negligence or that of a connecting carrier.

The Interstate Commerce Commission has expressed the opinion that under this statute a stipulation for exemption from liability for losses due to causes beyond the carrier's control is grounded upon a construction of the words of the statute "caused by it or the connecting carrier."

This construction of the statute was also adopted in *Greenwald* v. *Weir*, 130 N. Y. App. Div. 696.

If this be the true construction of the statute, the court erred in excluding this defense, and this presents a Federal question because the defense was ruled out as being in contravention of the act of Congress of June, 1906.

The court below erred in refusing to give effect to the stipulation of the contract making the measure of damages the value and price of the articles at the place and time of shipment.

The stipulation that in the event of loss the amount of damages recoverable shall be the market value of the goods at the place and time of shipment, if freely and fairly entered into is valid, although the courts in Texas hold that such a provision is invalid so far as it affects the company's liability for a loss caused by negligence. *South-*

ern Pacific Ry. Co. v. *Maddox*, 75 Texas, 300. This question, being one of general commercial law and not governed by statute, this court will be governed by its own decisions and the reasons which control its action. *Michigan Cent. Ry.* v. *Myrick*, 107 U. S. 102; *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall. 357; *Hart* v. *Penna. R. R. Co.*, 112 U. S. 331; *Matter of Released Rates*, 13 I. C. C. 559. It was not the purpose of the Carmack amendment to change this rule of law.

The right of action was created by the statute and jurisdiction to entertain it was conferred exclusively upon the Federal courts.

The state courts have not concurrent jurisdiction with Federal courts of suits brought on a statutory liability under the Interstate Commerce Law. The jurisdiction is exclusively in the Federal court. *Sheldon* v. *Wabash R. R. Co.*, 105 Fed. Rep. 785; *Van Patten* v. *Chicago, M. & St. Paul R. Co.*, 74 Fed. Rep. 901; *Northern Pacific Ry. Co.* v. *Pacific Coast Lumber Mfrs. Assn.*, C. C. A., 165 Fed. Rep. 1, 9.

Since the right of recovery rests upon a Federal statute, a Federal question is necessarily involved. *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S. 1; *Hoxie* v. *N. Y. & N. H. R. R. Co.*, 82 Connecticut, 356.

There was no appearance or brief filed for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In both these cases the plaintiff in error was held liable as "initial carrier" for failure to deliver mohair shipped from points in Texas to the consignee in Lowell. The company denied liability on the ground that under the contract expressed in the bills of lading its obligation and liability ceased when it duly and safely delivered the goods

to the next carrier. It excepts to various rulings of the trial court by which it was prevented from proving that it had fully complied with its contract; had duly delivered the mohair, at Galveston, to the first connecting carrier, which delivered it, at New York, to the next carrier, which, in turn, delivered it to the Boston & Maine Railroad. Neither the pleadings nor proof showed what this company did with the mohair nor the cause of its non-delivery, if indeed it was not delivered. For there was some evidence tending to show that this mohair might have been among other sacks, the marks of which had been destroyed, and were still held by the consignee awaiting identification. This contention, however, was found against the carrier, and it was held liable to the plaintiffs. 117 S. W. Rep. 169, 170.

The question as to whether the plaintiff was entitled to recover the value of the goods at Lowell or, as provided in the bill of lading, at the point of shipment, is suggested in one of the briefs. No such issue was made in the lower court, nor is it referred to in any of the many assignments of error involving the construction and constitutionality of the Carmack amendment to the Hepburn Act of 1906, providing that where goods are received for shipment in interstate commerce the initial carrier shall be liable for damages caused by itself or connecting carriers, and making void any contract of exemption against such liability. (34 Stat. 584.)

1. The jurisdiction of the state court was attacked, first, on the ground that § 9 of the original act of 1887 provided that persons damaged by a *violation* of the statute "might make complaint before the commission . . . or in any District or Circuit Court of the United States." 24 Stat. 379.

It was contended that *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, ruled that this jurisdiction was exclusive, and from that it was argued that no suit

could be maintained in a state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provision of §§ 8 and 9 of the act to regulate commerce. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 208.

The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.

Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 624, 637.

On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of

the United States. This presumption would be strengthened as to a statute like this passed, not only for the purpose of giving a right, but of affording a convenient remedy.

2. The question as to the constitutionality of the Carmack amendment, though ably and elaborately argued, is out of the case, having been decided adversely to the contention of the plaintiff in *Atlantic Coast Line R. R.* v. *Riverside Mills*, 219 U. S. 186, after the present suit was instituted.

The company, however, seeks to distinguish this from that on the ground that in the *Riverside Case* it was admitted that the damage to the freight was caused by the negligence of the connecting carrier. And, as the statute applies to cases where the damage is *caused* by the initial or connecting carrier, and as the cause of the loss of the goods does not appear here, it is argued that liability is to be governed by the contract, which provides that the initial carrier should not be responsible beyond its own line. Plaintiff in error insists that the Carmack amendment did not make it an insurer. Under the construction given that statute in *Matter of Released Rates*, 13 I. C. C. Rep. 550; *Patterson* v. *Adams Express Co.*, 205 Massachusetts, 254; *Travis* v. *Wells-Fargo Express Co.*, 74 Atl. Rep. 444, it claims that the initial carrier is not deprived of its right to contract with the shipper against liability for damages not caused by either carrier's negligence. But the failure to plead and to prove the cause of the non-delivery of the goods at destination precludes any determination of such questions.

Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation

and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is

Affirmed.